RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY POPULAR VOTE

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

SEVENTY-FIFTH CONGRESS

THIRD SESSION

ON

S. J. Res. 134

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO THE RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY POPULAR VOTE

JANUARY 18, 26, AND FEBRUARY 9, 1938

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CONTENTS

Statements of—	Page
L. E. Aylsworth, University of Nebraska	48
James Emery Brooks	3, 9
Nicholas Murray Butler	40
Judge William Clark	10
Hon. Bainbridge Colby	51
Merwin K. Hart	67
C. S. Leeds, Committee for Republican Integrity	44
Mrs. Margaret F. Robertson	81
Col. Fred B. Ryons	66
Mrs. Frances E. Slattery	77
John B. Snow, League for Constitutional Government	45
Geo. E. Sullivan	79
John B. Trevor, American Coalition	29
Abraham C. Weinfeld	45
Marguerite M. Wells, National League of Women Voters	46

RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY POPULAR VOTE

TUESDAY, JANUARY 18, 1938

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to call, at 10:30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris (chairman) presiding.

Present: Senators Norris (chairman), Connally, and Austin.

The subcommittee had under consideration Senate Joint Resolution No. 134, providing a method of amending the Constitution, which said joint resolution is here set forth in full, as follows:

[S. J. Res. 134, 75th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relative to the ratification of constitutional amendments by popular vote

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

"ARTICLE —

"SECTION 1. Article V of the Constitution of the United States is hereby repealed.

"SEC. 2. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part of this Constitution when ratified by popular vote in each of two-thirds of the several States as hereinafter provided.

"SEC. 3. Each amendment shall be submitted by each State to the electors thereof at the next general election held therein after the date the amendment is proposed; except that if a general election is to be held in any State within sixty days after the date an amendment is proposed the amendment shall be submitted to the electors in such State at the next succeeding general election. The electors in each State shall have the qualifications requisite for electors of the State legislature. Each State shall conduct the election and determine the result thereof as the law of such State provides, or, in the absence of such State law, as the Congress shall provide. The Congress shall have power to prescribe by a uniform law the form in which the question of the ratification of the amendment shall be submitted to the electors in the several States. If a majority of the electors voting in any State on any amendment vote for the amendment such State shall be deemed to have ratified the amendment.

"SEC. 4. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

"SEC. 5. This article shall apply only with respect to amendments to the Constitution which are proposed after the ratification of this article."

Senator NORRIS. The committee will come to order. This subcommittee of the Committee of the Judiciary of the Senate has for its consideration a resolution proposing to amend the Constitution, referred to it by the full Committee on the Judiciary. The resolution itself has been incorporated in the record.

Is Mr. Sullivan present? Mr. Sullivan sent me a sort of brief, or rather sent it to the full committee, directed to the chairman, which has been submitted to me. In fact, Mr. Sullivan sent me a copy of it, and he asked to be heard. I notified him of the hearing, and the time and place, but have had no response from him since that notice. Inasmuch as he is not here, I think it would be well to put the brief in the record. In order that other members of the subcommittee and other witnesses may know what it is, I think I shall read it. It is written from his office in the Woodward Building, this city, and signed by George E. Sullivan, an attorney of this city. It reads as follows:

SENATE JUDICIARY COMMITTEE, JANUARY 13, 1938.
United States Senate, City.

GENTLEMEN: Re Senate Joint Resolution 134, proposed by Senator Norris, to weaken the safeguards against hasty and unwise amendments to the United States Constitution.

As an active practitioner of law for more than 35 years, who took an oath to support and defend the Constitution of the United States more than 35 years ago, I am amazed and appalled at the proposals contained in the above-named Senate Joint Resolution 134, and sincerely trust that your committee will report the resolution adversely.

I can well understand how the pending proposals can find favor with those who have the impudence to assert that—"the Federal Constitution with its system of checks and balances represents a deep distrust of popular rule" (The Social Foundations of Education, p. 27, by George S. Counts). Professor Counts, as is well known, has aided Stalin in the setting up of the Soviet educational system, actually wrote the foreword to Stalin's The New Russian Policy published in 1931, and published a book of his own in 1932, Dare the Schools Build a New Social Order? urging a new democracy which "should not be identified with" "the popular election of officials, or the practice of universal suffrage" (p. 40). But I cannot understand how any friend of the American Republic can advocate such weakening of the safeguards against hasty and unwise amendments to the United States Constitution as would result from the pending proposals.

Why is it that the United States Constitution nowhere provides for a direct vote of the people for the adoption of any law, either general law or the supreme law? The reason is explained by the President of the United States in his recent message concerning the Ludlow amendment, namely, that this is a Republic based upon the representative system rather than a democracy, which would (in the very nature of things) be impractical and unworkable. The obvious reason why the Constitution provides for representatives of the people rather than the people themselves passing upon the adoption of laws, is that the ordinary voter is not equipped to handle such matters which require technical knowledge, experience, and ability possessed by few, just as does the practice of medicine or the handling of other sciences. Every thinking person should know that the existing provisions of the Constitution disclose no distrust of popular rule, but rather a purpose to protect and preserve it by avoiding the necessarily disruptive effects which would flow from the putting to popular vote of that with which the ordinary voter is not equipped to deal, but as to which the voters must depend upon chosen representatives selected for competency.

The pending proposals would reduce from three-fourths to only two-thirds the number of States needed to ratify an amendment, and would substitute a direct vote of the people in the States rather than the vote of the people's representatives sitting in State legislatures or conventions. I respectfully submit that each of such proposals would constitute a serious weakening of the existing safeguards against hasty and unwise amendments to the Federal Constitution. In the midst of popular distress, need, and dependence, the adoption of almost any kind of an amendment destructive of every principle of our Republic would be a serious possibility, if these unwise and dangerous proposals are substituted for the present method of amendment. Why should "the most wonderful work ever struck off at a given time by the brain and purpose of man" be subjected to such needless jeopardy?

Very respectfully and sincerely,

GEO. E. SULLIVAN.

STATEMENT OF JAMES EMERY BROOKS, GLEN RIDGE, N. J.

Senator NORRIS. Is Mr. Brooks present?

Mr. BROOKS. Yes, Mr. Chairman.

Senator NORRIS. Please state your occupation and residence.

Mr. BROOKS. My residence is at Glen Ridge, N. J. I am a lawyer.

Senator NORRIS. You may proceed to make your statement in your own way.

Mr. BROOKS. The following are some of my objections to Senate Joint Resolution 134, proposing an amendment to the Constitution of the United States.

1. The joint resolution does not specify a time limit for ratification of the proposed amendment by the States.

Experience has shown that 4 years is ample time for the ratification of any good amendment.

Senator NORRIS. Would you rather go on until you complete your statement, or shall we interrupt you with questions?

Mr. BROOKS. I am willing to be interrupted at any time.

Senator NORRIS. On that point let me interrupt you. Does not the resolution provide the time within which it must be adopted?

Mr. BROOKS. There is no time limit.

Senator NORRIS. I know; but it is limited in regard to the election. For instance, it says:

> Each amendment shall be submitted by each State to the electors thereof at the next general election held therein after the date the amendment is proposed; except that if a general election is to be held in any State within 60 days after the date an amendment is proposed the amendment shall be submitted to the electors in such State at the next succeeding general election.

Mr. BROOKS. That does not apply to the amendment you are offering.

Senator NORRIS. I thought that was part of the amendment.

Mr. BROOKS. This amendment will have to be adopted in the usual way.

Senator NORRIS. Oh, that is what you mean?

Mr. BROOKS. That is what I mean. Experience has shown that 4 years is ample time for the ratification of any good amendment.

Senator NORRIS. You mean this resolution, providing a method to amend the Constitution, should be submitted to a convention or to legislatures?

Mr. BROOKS. Yes. But there is no time limit within which the amendment must be adopted or rejected.

Senator NORRIS. That is true. When I interrupted you I thought you had reference to future amendments.

Mr. BROOKS. I had reference to this particular amendment. I think no harm can come from putting a time limit on it. I think 4 years would be ample.

Senator NORRIS. You may proceed.

Mr. BROOKS. The words: "or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments," which, "in either case," part of article V of the Constitution, have been omitted in the proposed amendment.

There is no valid reason for scrapping this provision, giving the States a means of moving for amendment. Scrapping this provision is, in my opinion, a blow at States' rights.

Senator CONNALLY. Your objection is that, under this proposed method, nobody could submit an amendment except Congress?

Mr. BROOKS. Yes. There is another thing. Congress may propose a definite, flat-footed amendment. The States, through their legislatures, can call upon Congress to provide a constitutional convention.

Senator CONNALLY. That is largely theoretical. That right has never been invoked?

Mr. BROOKS. It has not been done, but it can be done.

Senator CONNALLY. I understand that, but as a practical proposition, during 150 years' experience, it never has been done.

Mr. BROOKS. I admit that, but I do not see any occasion for throwing it out.

Senator CONNALLY. I understand your position.

Mr. BROOKS. And depriving the States of that right.

Senator NORRIS. You may proceed.

Mr. BROOKS. The proposed amendment does not provide a time limit in which future amendments may be ratified by the States.

There should be a definite constitutional provision for rejecting, as well as for ratifying, proposed amendments.

We have had a horrible example of that in the child labor amendment, and there does not seem to be any way of knowing when that will be rejected.

Senator CONNALLY. Or adopted.

Mr. BROOKS. Or adopted. Here we have a condition where the Court of Appeals of Kentucky says that has been dead for years, and the Supreme Court says it is still alive.

Senator NORRIS. Now, Mr. Brooks, would that happen if this amendment were adopted? By its terms it says it shall be submitted at one of two general elections in the State. If it is proposed to a State more than 60 days prior to a general election in that State, it will be voted on at the next general election; and if it is submitted less than 60 days before the general election, it will be voted upon at the next succeeding general election in that State.

Senator CONNALLY. They might reject it.

Mr. BROOKS. I see no reason why you should not provide for a way in which it can be rejected. What harm is there?

Senator NORRIS. I do not see any harm in it. At the preliminary meeting of the subcommittee, while we did not pass upon it, those who were present agreed upon a tentative amendment at the end of section 3 on page 2, as follows, reading from the amendment itself:

> If a majority of the electors voting in any State vote for the amendment, such amendment shall be deemed to have been ratified—
>
> or—
>
> such State shall be deemed to have ratified the amendment.

That amendment was submitted and agreed to by all the members of the subcommittee who were present at that meeting. We did not vote on it. Also to add after that:

> Otherwise, the amendment shall be regarded as rejected by such State.

Mr. BROOKS. I hope you adopt that portion of it.

Senator NORRIS. I do not think there is any objection to it.

Mr. BROOKS. I strongly urge that you do adopt it.

Senator NORRIS. You may proceed.

Mr. BROOKS. The proposed amendment is a violation of the principle of our form of government by representatives.

An amendment to the Constitution should be ratified, insofar as is practicable, in the same manner as was the original Constitution; that is, by State conventions, or by State legislatures, acting as conventions for the time being, and not by majority votes of the people of the States.

This is a federation of 48 republics where the sovereign people govern through representatives. If we are to be governed by majority rule of the people only, there will be no need for a Congress. Anyone could propose a law and call for a referendum vote of the people. There will be no need for courts and juries, every execution will be a lynching.

Senator CONNALLY. What is that?

Mr. BROOKS. I say that a lynching is conducted by majority rule. Lynching is a very democratic affair. The majority act in favor of it, but we believe the minority should be protected.

Senator NORRIS. In the case of lynching the minority would probably be composed of one individual, but he would not have an opportunity to voice his objection.

Mr. BROOKS. No.

Senator CONNALLY. You should not confuse what is happening here with what is happening upstairs.

Senator NORRIS. You may proceed.

Mr. BROOKS. It would be the end of our American system, a system of government which has developed the greatest union this world has ever known.

The proposed amendment does not give the people of the States sufficient time for deliberate consideration of so important a matter as an amendment to the fundamental law of the land.

We elect or appoint judges, and we expect these judges to know more about the law than the voters who elect them, or over whom they are appointed.

We elect members of State legislatures and the Federal Congress, and we expect them to become experts in the making of laws. We expect the members of a State legislature to be better judges of the merits of a proposed amendment to the Federal Constitution than the people who elected them.

If the people of the States are to have the responsibility of ratifying these proposed amendments, then a much longer period of time should be allowed for the people to learn of the merits or demerits of the proposed amendments. It means campaigns of education, both difficult and expensive.

How could the people of a State be expected to vote intelligently on an amendment submitted only 61 days before election day?

Is that not absurd?

Senator NORRIS. Now, Mr. Brooks, will you not take into consideration the fact that, before that amendment goes to the States, it has been proposed in Congress, passed through the Senate by a two-thirds vote, then taken to the House of Representatives and passed through that body by a two-thirds vote? Do you not suppose, with the general debate that would occur all over the country on that amendment, even before it is submitted to the States, the people will become familiar with it?

Mr. BROOKS. I doubt it very much. I doubt if any more than a mere handful of people know anything about this joint resolution.

Senator NORRIS. It has never been adopted by Congress.

Mr. BROOKS. It is before the committee.

Senator NORRIS. Yes; but you always have to have a starting point. Of course, the public would know nothing about it until it actually comes before the Congress.

Mr. BROOKS. I found only one man in New York who had noticed it in the back of the newspaper.

Senator NORRIS. It has received very little publicity up to this time. Of course, we could easily say that it should not be passed on by the States for 5 years after it has been submitted, and give them a chance to consider it.

Mr. BROOKS. There is quite a difference between 5 years and 61 days.

Senator NORRIS. I admit that. Of course, that would be an extreme case. Suppose we say 90 days or 6 months.

Mr. BROOKS. The year following would be better.

Senator NORRIS. Then you would have a delay.

Mr. BROOKS. Our present method is perfectly satisfactory, as to the matter of time, at least.

Senator NORRIS. What about the child-labor amendment? I thought you were complaining about that?

Mr. BROOKS. I am not complaining about it. I want to see it dead and buried. I say it has been rejected.

Senator NORRIS. If we adopt the amendment I have submitted that would settle it one way or the other.

Mr. BROOKS. You can easily put in an amendment to the Constitution which will take care of that, and I have it right here.

Senator CONNALLY. Before you go into that, let me ask you this, along the line suggested by Senator Norris: Would not people be more apt to give the matter careful study and consideration if it were required that they act within a reasonable time after submission, rather than to drag it out over a considerable period of time? We submit it up here, and the people would be thinking about it. Would not that be considered?

Mr. BROOKS. By the legislatures?

Senator CONNALLY. I mean by the people.

Mr. BROOKS. No.

Senator CONNALLY. Would not that be better than to drag it out over a long period of time? The Japanese war would come along and the people would be reading about it, or something happening in Italy, and they would forget all about this. A new picture show might come out to attract attention of the people.

Mr. BROOKS. If you leave our present method alone and put this in, I think it will save the whole thing:

Amendments not ratified by three-fourths of the States within 4 years after being submitted by the Congress shall forever lapse.

Senator CONNALLY. You do favor a time limit of some kind?

Mr. BROOKS. In my lifetime there have been seven amendments adopted. The fifteenth took a year and a month; the sixteenth 2 years and about 7 months; the seventeenth 1 year and 15 days; the eighteenth 1 year and 42 days; the nineteenth 1 year and 3 days;

the twentieth less than a year; and the twenty-first less than 10 months.

Senator NORRIS. That time is computed after submission to the States.

Senator CONNALLY. We developed in the judiciary hearings on the court bill that the average time was about 14 months.

Senator AUSTIN. That is my understanding. I was corrected on that. I said 17 months.

Senator CONNALLY. It was 14 months.

Mr. BROOKS. This method might take longer. Some States would have to wait over a year.

Senator AUSTIN. Some would have to wait 4 years, or approximately so. Take Alabama, which has a general election only once in 4 years. It could not consider this proposal for 4 years, plus the time consumed in the first year. It is probable that New York will soon provide for general elections once in 4 years. Therefore, in those States it could not be considered within 4 years. I think that is a point that should be studied with some care. Perhaps it may have to be changed to some other election, say the election at which Representatives in Congress are elected.

Senator NORRIS. That would cut it down to approximately 2 years.

Senator CONNALLY. I would not favor a general election, but I think it should be an election for that purpose alone. You have a general election, you may have 100 candidates and a large number of State amendments, and I do not believe it would receive sufficient consideration. I would prefer an election or nothing else. Then you would have but one issue, and the people would know what they were doing. Where you have a large number of amendments, many of the voters become confused and do not understand the real issue, and they will just vote against them. But you will get a pretty good expression of public opinion if you submit it at a special election.

Senator AUSTIN. I see your point. We do not have to agree on all these matters as we go along.

Senator NORRIS. Oh, no.

Senator AUSTIN. We are just discussing them while the witness is here.

Senator CONNALLY. In my State, when we have general elections they submit sometimes a considerable number of amendments to the Constitution, perhaps as many as five or six. A voter goes in to vote who is interested in who is going to be sheriff, and when he gets down to the amendments he probably doesn't vote on them at all.

Mr. BROOKS. He would probably vote yes on all of them.

Senator CONNALLY. No. I think the natural reaction is to vote no, rather than to vote blindly on a number of amendments.

Senator NORRIS. You may proceed, Mr. Brooks.

Mr. BROOKS. Reducing the number of States necessary to ratify, from three-quarters to two-thirds, weakens the Constitution.

It is my belief that the proposed amendment would open the door to future amendments that would reduce the once proud American citizens to the level of the serfs of Soviet Russia.

I refer to changing it from three-fourths to two-thirds, which I say would weaken the Constitution. It is my belief that the proposed amendment would have that effect.

Senator CONNALLY. That is going rather far.

Mr. BROOKS. That is what I believe.

Senator CONNALLY. Just changing that two-thirds to three-fourths?

Mr. BROOKS. No. I mean changing it over from a republican form of government to a democracy.

Senator NORRIS. Take your State How does it provide for amending the State Constitution?

Mr. BROOKS. We do that by popular vote.

Senator NORRIS. Does it require a three-fourths majority?

Mr. BROOKS. I think it is only a majority.

Senator NORRIS. When it is submitted it only requires a majority vote?

Mr. BROOKS. Yes.

Senator NORRIS. What about Stalin in your State? Have you ever noticed anything in regard to that? Has there ever been any charge of his interest in any amendment?

Mr. BROOKS. No.

Senator NORRIS. Have the Communists made any capital out of that?

Mr. BROOKS. There have not been any. They are submitted once in 5 years.

Senator AUSTIN. I would like to ask Mr. Brooks a question relating to the claim that this would be a change from a representative form of government to a pure democracy. Do you recognize that there is a fundamental difference between the act of originating the fundamental law and the act of originating law that really governs the conduct of the citizens?

Mr. BROOKS. Yes; I think so.

Senator AUSTIN. Do you think that everything relating to the fundamental law which creates the Government ought to be referred solely to legislatures or conventions, instead of being referred to all of the sovereigns, all of the people?

Mr. BROOKS. I would prefer the present method. I think it will produce better results. We are interested in the result quite as much as in the method.

Senator AUSTIN. I do not know whether you hold this view or not, but from your remarks I caught the idea that this act of ratification is the act of the several States. Do you so regard it, or is it, in your opinion, a purely Federal function?

Mr. BROOKS. I think the States are acting as entities in this matter.

Senator AUSTIN. Then I have the correct inference from what you said.

Mr. BROOKS. The very fact that it is submitted to the States for adoption or rejection, in my opinion, proves that the States are acting as entities.

Senator AUSTIN. Are you aware that time after time the Supreme Court of the United States has held that is a Federal function, and that the people of the United States can speak in the matter of an amendment to the Constitution and not the people of the several States, as States?

Mr. BROOKS. I have heard of that.

Senator CONNALLY. Isn't that modified to this extent: That while they hold it is a Federal function, which it is, of course, amending the Federal Constitution, the States are really acting as States?

Senator AUSTIN. Oh, yes.

Senator CONNALLY. By reason of the vote of the people of that State not in a convention or through their representatives.

Senator AUSTIN. No; I think that is not quite accurate. The acts of the State are merely the acts in the form in which the question is submitted to the people of the Nation.

Senator CONNALLY. Why did not the Constitutional Convention provide for a vote of the whole Nation?

Senator AUSTIN. There were members of the Convention who favored that.

Senator CONNALLY. Exactly, and they rejected it.

Senator AUSTIN. It was rejected, upon the theory that we were to have a representative form of democracy instead of an absolute democracy. I believe Mason favored the idea of submitting the fundamental law directly to the people.

Senator CONNALLY. It has been held that the method of submission and all that sort of thing is purely a Federal function, under procedure laid down by the Congress in the submission of resolutions, as contradistinguished from the legislature of the State, which acts through its own machinery.

Senator AUSTIN. That was debated in connection with the repeal of the eighteenth amendment.

Senator CONNALLY. A case went up from Florida in which the State law provided for a vote of the people, and the court held that was ineffective and that they had to act through the method laid down by Congress, because it was a Federal function.

Senator AUSTIN. The Constitution uses the preposition "in," "conventions in the States" and not "conventions of the States." However, we do not need to cause any delay in a discussion of that, and I do not intend to do so. What I want to know is whether you regard it as a State function.

Mr. BROOKS. I would like to call attention to the situation in my State. New Jersey has 21 counties. One of those counties, under the well-organized political machine, can roll up a majority for the dominant party in that county large enough to overcome the popular vote of the rest of the State. That county can elect but one of the 21 members of the State senate, and only one-fifth of the members of the State assembly. There is no difference in the practical effect.

Senator AUSTIN. Do you recognize the difference in the quality of the amendments that are proposed? That is to say, where you have such an amendment as the eighteenth amendment, you have accompanying it a general policy.

Mr. BROOKS. Certainly.

Senator AUSTIN. Every elector probably has a position on such a question.

Mr. BROOKS. Yes.

Senator AUSTIN. It does not require any technical or special knowledge or experience to pass upon it.

Mr. BROOKS. No.

Senator AUSTIN. Suppose you had an amendment proposed to change the status of the Supreme Court of the United States. There you would have to have some special knowledge.

Mr. BROOKS. Yes.

Senator AUSTIN. You might in one instance submit it for the consideration of the electorate, whereas in another you might find it wise to adopt the alternative and submit it to the legislatures.

Mr. BROOKS. Would not that be all the more reason for having passed upon by legislatures or conventions, in the cases you just mentioned?

Senator AUSTIN. There is a difference in the quality of amendments proposed?

Mr. BROOKS. There is a difference in them.

Senator CONNALLY. Senator Austin, may I supplement what I said about State and Federal functions? I do recall that some States passed State laws providing that the legislature should not act upon Federal amendments until after a new legislature should have been elected. I think the court held that was ineffective.

Senator NORRIS. I think that is right.

Senator CONNALLY. The Federal Constitution provides for ratification by the legislature, as one method, and if any legislature has already been elected the people have no idea of the attitude of its members.

Senator NORRIS. They have the constitutional choice of the method of submission.

Senator AUSTIN. Ohio has a provision requiring a plebescite.

Senator CONNALLY. It was held invalid.

Senator AUSTIN. The Supreme Court held it of no effect.

Senator NORRIS. We are very much obliged to you, Mr. Brooks.

STATEMENT OF HON. WILLIAM CLARK, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator NORRIS. Judge Clark, you may proceed in your own way to make such statement as you desire. First, state your name and occupation.

Judge CLARK. William Clark, United States district judge for the district of New Jersey.

Senator NORRIS. How long have you been United States district judge?

Judge CLARK. About 12 years. Before that I was judge of the court of appeals for 2 years.

Senator NORRIS. Go ahead in your own way.

Judge CLARK. Might I begin by saying that a very interesting article was published in the Harvard Law Review this month, which I will be glad to leave with you, on the question of whether this is a Federal function or not. It discusses all those cases, the Ohio case and others.

I have a little statement I will read, and if you care to interrupt me, I shall be very glad.

My only previous appearance before a committee of your honorable body was, I am proud to say, as one of the few witnesses called in support of the law now known as the Securities Exchange Act. Mr. (now Judge) Pecora advised me then that you prefer the witnesses to read prepared statements, and I am accordingly complying with that practice.

As Senator Norris' kind invitation was only received on Sunday, and as I spent all yesterday sitting in a statutory court under the

recently enacted act of Congress, I have not had an opportunity to have that statement properly mimeographed. If your committee thinks it worth while, I can furnish the members with copies later.

At the outset I might say that I rather question the need of any testimony in support of the submitted amendment to the Constitution. This because I think that its mere sponsorship is sufficient guarantee of its wisdom. As one who has held that view perhaps longer than some others, I take pleasure in here recording my firm impression that the American people have come to think that whatever Senator Norris advocates is best for them and should be done.

However that may be, the only excuse I have to offer for taking up your time is, first, the fact that in 1933 I made some study of the process of constitutional amendment, the results of such study being submitted in a letter written at the request of former Senator Barbour, printed as Senate Document 181, Seventy-second Congress, second session; and second, that my hobby, if it can be so called, for a number of years has been the study of comparative constitutional law.

I do not wish to seem pedantic and indulge too much in theories of political science. In this country we have become so accustomed to written constitutions that we do not always realize that they are only necessary in federations where the contract between the central government and the component units requires embodiment in a rigid framework. By the same token, this rigid framework must be given a rigidity impervious to the ordinary action of the central legislature; otherwise, of course, that central legislature can convert a Federal into unitary form by its own usual action and thereby make the original Federal creation a waste of time. The rigidity impervious to the ordinary action of the central legislature can be described in more common parlance as the amending process which we are met here to consider. The amending process and its operations are therefore of the essence in any study of Federal Government.

It is interesting to observe that in the majority of the world's federations the principle upon which the rigid framework is altered involves only the central legislature, and that the federal principle is preserved only by the requirement that the altering action be taken under special circumstances. These circumstances are in the main the insistence on a special majority of two-thirds or three-fourths, and/or a period for reflection, that is, repassage after a year. This is true of the Union of South Africa, Mexico, and the Spanish and South American Republics. In fact, only the United States, Switzerland, Australia, and the Weimar Republics insist upon action elsewhere than in the central legislature.

It is further significant that of these four instances of action elsewhere, all except the United States, the action is by referendum or popular vote and that only in Australia is that vote by component units (in Australian States). In other words, we find that as a matter of comparative constitutional law our rigid framework can be altered by a method peculiar to ourselves and in practice in no one of the world's other federations.

Can we justify our originality, or is Senator Norris right in, at least, approximating our practice to that of the next most peculiar, that of Australia? Once you go beyond action by the central legislature there are quite clearly three methods of action (ratification) by the component units. They are, first, action by the permanent legislative

body; second, by a body specially elected for the purpose of acting; and, third, action by the general body of electors. This last method is that of the offered amendment.

Population has destroyed pure democracy. The printing press makes possible its partial restoration at least. Obviously the procedure of the Greek city, state, the tribal assembly, and the New England town meeting is unsuited to larger bodies of men. Hence, the growth of government by selected representatives. Originally this form of government was intended to exclude any element of democracy or direct action by the people. The selected representatives were selected for the very reason that the electors selecting them trusted their judgment. A perfect example of this trusteeship theory is found in the election of the President and Vice President in the early days of the Republic.

Gradually, however, the demos asserted itself, and the representative government leaned more toward what the French call the "mandat imperatif." The independent judgment of the representatives became mixed with an element of consultation with the represented, whether by way of personal and party platforms or direct touch with individual voters or organized bodies representing groups of voters.

Once assuming this consultation, a conscious process, it is clear that ratification by State legislatures as at present provided is unsound. In the first place, one cannot consult unless one knows the subject for consultation. A legislator elected without reference in time to the submission of a constitutional amendment has not consulted his electorate thereon. This situation is recognized by the amendment proposed to the Sixty-seventh Congress in Senate Joint Resolution No. 40 by former Senator Wadsworth and former Representative Garrett, their proposed amendment requiring the election of at least one house of the ratifying legislature after the proposal of the amendment; and by a provision of the constitution of Florida of 1870 (art. 2, sec. 32), which goes even further and forbids either legislative or convention ratification unless the election has taken place after submission.

Senator Austin's distinction as made between various kinds of amendments is also made by the Missouri Constitution, which says that amendments infringing upon local self-government must be submitted differently from the ordinary amendments.

In the second place, the election of a State legislature may be proper with reference to time and not proper with reference to singleness of the issue upon which consultation is had. In other words, the legislature of a State is never elected upon the sole issue of a particular amendment to the Federal Constitution. In the nature of things there are many issues before the people of a State. So it may be that a voter will balance those issues and vote, let us say, for Mr. X, who agrees with the voter on the issue of a State chain-store tax, although he knows that Mr. X does not agree with him on the wisdom of an amendment to the Federal Constitution giving the Central Government power to pass a uniform divorce law, let us say.

And finally, the consultation with State legislators may not be effective because of the human element present in politics, as in other mundane affairs. Legislator X may have and probably has political ambition and the purity of his consultation and representation may be affected by his desire to stay or advance in public office.

Coming now to the second method of ratification by a specially elected body or convention, if we are to regard a convention as a truly

representative body constituted on the trusteeship theory, we are faced with none of the objections which we advanced in discussing legislative ratification. As a matter of fact a convention, a contemporary body, in the nature of things, is elected after submission. Because, however, it is acting on the trustee theory, consultation is eliminated and the time element becomes irrelevant. By definition there is only one issue before it and no confusion, therefore, in the selection of the delegates. By the same token, those delegates are not apt to be influenced by personal ambition. Their job begins and ends with ratification or rejection.

On this theory of a deliberative convention, our preference as between it and a direct referendum depends largely upon our feelings about democracy. The growth of mechanical conveniences has made it possible for the people to act directly. The issue of acceptance or rejection of changes in the fundamental framework is not complicated by the details besetting ordinary legislation. The constitutions of, I think, all of the States are so amended. The constitutions of other federations, requiring action by the component units, are so amended. Personally I have no distrust of democracy. I believe, in fact, that the only way to make people fit to exercise power is to educate them by its exercise. So I would most emphatically educate them in the use of the amending power by permitting them to ratify or reject amendments through Senator Norris' plan of referendums.

There is one further observation that should be made. We have been speaking on the assumption of the representative or trusteeship theory of a ratifying convention. As a matter of fact, the American people, in their only opportunity to consider the matter, seemed to have rejected that theory and adopted the other or binding-instruction theory. I happen to have had something to do with drafting the model law for the setting up of ratifying conventions by State legislature for the consideration of the only amendment so considered. We offered a choice of the deliberative or the instructed convention, and I think no one of the 48 States chose the instructed type. Of course, if that is to be the settled practice, a ratifying convention, like the present-day electoral college, is simply a very expensive form of referendum, and, a fortiori, Senator Norris' amendment should be adopted.

Senator NORRIS. The only issue at the election of those representatives by the people would be whether they were for or against the proposed amendment.

Judge CLARK. Exactly so. I drew the New Jersey bill, and we had a special election on September 18 where we voted for delegates. Two matters were submitted. One was ratified and the other was rejected.

In conclusion, I would like to express this thought: I believe the amending process is of especial interest at this time, because I am convinced of the necessity for its more frequent use. This for two reasons: The ancient theory has been, in the famous dicta of Justice Story, "That constitutions of necessity speak in general terms." One suspects that our own Constitution so speaks to some extent, at least, because the founding fathers were fearful of the ratifying results if they were too specific. However that may be, the general theory has an inevitable concomitant, the theory of interpretation. It would not be becoming for me to comment on the workings of this

theory of interpretation. I noticed the other day that Senator Pepper, surely no radical, was quoted as referring to it as government by subterfuge. At any rate, the tendency of all constitutions since our own has been toward a more detailed certainty. The people rather than the courts do the talking. I have in my hand the Indian constitution, the most lately adopted Federal constitution. As you see, it is a book of 325 pages.

The second reason I believe that the amending process is about to be more freely used is simply the fact that it seems to me that political scientists are beginning to find the present allocation of power inadequate to modern conditions. This is perhaps too controversial a subject for one of my humble attainments to take up your time in discussing. I will confine myself to calling your attention to the fact in Australia and Canada, the other great Anglo-Saxon federations, commissions were appointed for the express purpose of studying and reporting on the working of the distribution of powers in those comparatively modern constitutions, and by ending with a quotation from Thomas Jefferson's famous letter of 1816 on amending the Constitution:

> Some men look at constitutions with sanctimonious reverence, and deem them like the Ark of the Covenant—too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.
>
> I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and 40 years of experience in government is worth a century of book reading; and this they would say themselves were they to rise above the dead.

Senator AUSTIN. To whom was that written?

Judge CLARK. That is a letter to a friend. I can get it for you.

Senator CONNALLY. Thomas Jefferson advocated every generation amending the Constitution?

Judge CLARK. Yes. That is about what he says.

Senator NORRIS. Have you any questions, Senator Austin?

Senator AUSTIN. Yes.

Judge Clark, I should like to get your view of the possible effect of providing in this proposal an alternative to be adopted by Congress with reference to ratification. What do you think of the idea of preserving the power in Congress to elect the method of submitting that to a direct vote or a vote of the legislature, depending upon the character of the amendment to be ratified?

Judge CLARK. Would you prefer to leave it entirely to the discretion of the Congress?

Senator AUSTIN. That is a question. It is a new thought to me. I have never studied it out to a logical conclusion, and I would like to get your view on it.

Senator NORRIS. I think the Senator means whether we should preserve what we now have and add this as an additional method.

Senator AUSTIN. Yes. I see no use of the convention, but I refer to the old method now contained in the Constitution and the one proposed by this amendment.

Judge CLARK. I think that would have the same practical effect.

Senator NORRIS. I do not think you understood him. He does not want to submit it to conventions, but his question is whether we should leave it within the power of Congress in submitting amendments to say whether it should be voted on by the legislature or should be voted on in the way provided for in this amendment.

Senator AUSTIN. Yes.

Judge CLARK. He wants to substitute this method for the convention method?

Senator NORRIS. Yes.

Senator CONNALLY. According to your theory, Congress alone would determine whether it should be submitted to the people or the legislature.

Senator AUSTIN. Quite true.

Senator CONNALLY. You could not very well say you would submit a judicial question to the legislature. You would have to leave that power with the Congress.

Senator AUSTIN. Just as it is now.

Senator CONNALLY. On the theory that on some questions Congress could decide it better than the people.

Senator AUSTIN. That is the idea.

Judge CLARK. Would it not be well to—in some way—to restrict that along the line of your suggestion to Mr. Brooks, that matters that relate to the structure of government perhaps should be and could be better dealt with by the State legislatures? For instance, the direct election of Senators related to the structure of government. So did Senator Norris' amendment changing the date of the inauguration of the President. Those are more technical matters than something like the income tax or the prohibition amendment, on which, as you said, all people have strong views. If you believe in restriction by Congress, I would be inclined to think the Congress would take the legislative method of ratification. There was one strong illustration that resulted in the adoption of conventions in the repeal of the eighteenth amendment.

Senator AUSTIN. It may be there should be some limit on the power of Congress in reference to that.

Judge CLARK. I do not think there is any doubt that in technical matters the legislature would be far better equipped; but in questions like child labor, the income tax, the eighteenth amendment, I do not take the same view.

Senator NORRIS. On that point, taking the amendment as it exists now, the principle of it, do you think that such technical matters as were referred to by Senator Austin would not be fully discussed by the Congress, anyway, and that further discussion of such technicalities would probably be extensively indulged in before the amendment is really submitted to the States for ratification?

Judge CLARK. I had not thought of the point suggested by Senator Austin. I think it would require some study and thought as to whether an amendment could be of such a technical character that it could be better dealt with by the legislature.

Senator CONNALLY. Would there not be danger in that aspect of it? If you leave the discretion with Congress, would not that really mean they would suggest the legislative method rather than submitting it to the people?

Judge CLARK. If you leave it untrammeled.

Senator CONNALLY. Congress would say the people did not know anything about it.

Judge CLARK. I think so, if you left it untrammeled.

Senator AUSTIN. I did not intend to indicate that I am committed to that principle. I wanted your view.

Judge CLARK. I understood you so.

Senator AUSTIN. Have you decided in your own mind as to whether it should require only a two-thirds vote?

Judge CLARK. I am inclined to the two-thirds vote. The other federations used two-thirds. We are the only one using three-fourths. I have always felt that three-fourths was really too much to require.

Senator AUSTIN. What is your view of the time? Do you think 60 days is sufficient? Do you have any view regarding that?

Senator NORRIS. I would like to have your view on that. Does this proposed amendment before us limit the time too much?

Judge CLARK. May I see the exact language?

Senator NORRIS. It is in section 3, which provides [reading]:

> Each amendment shall be submitted by each State to the electors thereof at the next general election held therein after the date the amendment is proposed; except that if a general election is to be held in any State within 60 days after the date an amendment is proposed the amendment shall be submitted to the electors in such State at the next succeeding general election.

Judge CLARK. The thing that occurred to me when Mr. Brooks and you were discussing that was this: Would the use of the words "the general election" be sufficient? Is it not a fact that in the State of Alabama, for instance, and perhaps other States, they hold general elections every 4 years?

Senator CONNALLY. We elect a governor every 4 years.

Senator NORRIS. Every State elects Members of the House of Representatives every 2 years. Perhaps there should be a change there. There might be some question as to whether that should be a general election.

Judge CLARK. That is what I mean.

Senator NORRIS. Suppose we say at the next election at which Representatives in Congress are chosen.

Judge CLARK. I think that would be very satisfactory. That would give a little more time for consideration. I think it is clear that Congress and the country would be discussing it.

Senator NORRIS. I can see, in some States having general elections only once in 4 years, there would be some difficulty.

Judge CLARK. I think that is true. I think that suggestion would be an improvement.

Senator AUSTIN. How about the 60 days? Do you think that is adequate?

Judge CLARK. It would be safe on Senator Norris' suggestion to increase that, would it not?

Senator AUSTIN. It seems to me it would.

Judge CLARK. One hundred and twenty days, I should think.

Senator AUSTIN. How about 6 months?

Judge CLARK. That is 180 days.

Senator NORRIS. As a matter of practical operation, where the Constitution now provides that Congress shall first meet on the 3d of January of each year, it would be almost universal that Congress would submit amendments to the States some time during that session, which usually adjourns in June, July, or August.

Judge CLARK. Prior to the next general election.

Senator NORRIS. Prior to the next general election. That would always give them more than 60 days, as a practical matter.

Judge CLARK. Yes.

Senator AUSTIN. As a rule, the general election would always come in November.

Judge CLARK. If you take Senator Austin's 6 months.

Senator NORRIS. In most amendments it would mean 6 months.

Judge CLARK. I think so.

Senator NORRIS. Suppose it were submitted in July. It would not be voted on until November.

Judge CLARK. I suppose Senator Austin wishes to insure against an extra session, where it might be submitted.

Senator NORRIS. Probably so. With an extra session in October, it might make the time too long. I do not see any objection to extending the time beyond 6 months.

Are there any other questions?

Judge, we are very much obliged to you.

Judge CLARK. Thank you.

Senator AUSTIN. I believe you have a definite opinion on that question of whether it is a Federal function.

Judge CLARK. My own view at the time was that it was probably not a Federal function. Senator Barbour discussed that at great length and probably wrote to you about it.

Senator AUSTIN. Yes. He submitted your opinion to me.

Judge CLARK. I know that I thought it should be done, as a practical matter, by the States, because it was my view at the time the matter was discussed.

Senator NORRIS. Senator Austin, I think it might be well to have that opinion in the record.

Judge CLARK. I have it in my bag.

Senator NORRIS. Very well. Let it go in the record.

(The document referred to is here set forth in full, as follows:)

[Senate Doc. No. 181, 72d Cong., 2d sess.]

RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY CONVENTIONS

Mr. Barbour presented the following letter from Hon. William Clark, United States district judge for the District of New Jersey, submitting his views on the convention method of ratification of constitutional amendments.

JANUARY 10 (calendar day, FEBRUARY 6), 1933.—Ordered to be printed

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY,
Newark, N. J., January 19, 1933.

Hon. W. WARREN BARBOUR,
Senate Office Building, Washington, D. C.

DEAR SENATOR BARBOUR: I have your letter of January 9 in which you "request my views on the convention form of ratification." I am in some doubt as to the value of my opinion as compared with that you can very easily obtain from your colleagues. I think that some of the greatest constitutional lawyers of our history happen to be in the present Senate. I need only mention Senators Norris, Borah, and Walsh, of Montana. However, as I have made some study of the subject in the past 2 years and as you ask it, I am setting forth some thoughts for your consideration.

The controversy over prohibition has a natural tendency to overshadow the more fundamental question of constitutional procedure. I say more fundamental advisedly. A present and proper solution of the liquor problem is, of course, essential to the country's welfare. More vital, however, is a wise resolvement of the question of constitutional procedure presented by the alternative methods of ratification. As is known, the Congress has heretofore always "proposed" ratification by legislatures in the States. The reason for its course is historical. The tacit preconstitutional understandings reached in the original ratifying conventions made the ratification of the first 11 amendments a mere formal matter. The congressional choice of method in the next three is implicit in the history of reconstruction.

Departure from precedent is always difficult. For lawyers, it seems almost impossible. The precedents are their broomsticks. The current discussion of the convention method of ratification is (so far as I know) the first mention of the alternative provision since a message of President Johnson (June 22, 1866) and a speech in the Senate by Senator Dixon, of Connecticut (Congressional Globe for Jan. 28, 1869, 3d sess., 40th Cong., p. 706), in the tragic reconstruction days. I venture the prophesy that, if the convention method is not adopted now, the American people will be forever deprived of the opportunity to express their opinion of constitutional amendments in one of the ways offered them by the wisdom of the fathers. "Or by conventions in three-fourths thereof" will become a dead letter in our Constitution, the first in our constitutional history.

The answer to your inquiry seems to fall naturally into three divisions: The desirability of convention ratification, its constitutional aspects, and finally the legal mechanics of a ratifying convention.

DESIRABILITY—GOVERNMENTAL ASPECTS

It will be conceded that a constitutional change should be effected only with the approval of the people. "Consent of the governed" applies with especial force to alterations in the underlying framework of government. Very early in the march of civilization it was found sometimes impossible to obtain that consent directly. The acropolis and town meeting had their limitations. Various governmental forms for meeting this practical difficulty have been devised. The best, the referendum, was late in occurring to political scientists because of early conditions in education, communication, and the printing arts. The next best, the representative body, was coincident with a desire for democracy.

As representation in terms excludes ignorance, the will of the people must be conveyed to their representatives. Having been so made known, it may have entirely opposite effects. It may, on the one hand, be regarded as binding. This is known as the conduit pipe or mandat imperatif theory (see De Tocqueville) or it may, on the other hand, be considered as only one of the several factors (perhaps an important one) upon which the independent judgment of the individual representative is based. This trusteeship concept is most famously expounded in Edmund Burke's Letter to the Sheriffs of Bristol. (Byrce, Modern Democracies, vol. II, p. 384.)

A State legislature has turned out to be a representative body peculiarly unfitted to express the popular will as to constitutional amendments. This is so because of circumstances which have arisen since the framing of the original Constitution. We, rather than our early wise men, are to blame. The undoubtedly believed in the trusteeship theory and had faith in the opportunity and ability of the trustee-representative in a State legislature to act for the best interests of his cestui trusts—all the voters of his sovereign State. Let us consider how their expectations have been fulfilled.

To put it in terms of the radio art, we find the message of the people on constitutional amendments sent over a closed circuit, on air full of static and to an inadequate receiving set. Or, in plain English, the instructions to the legislators are given at the wrong time, they are confused, and the legislators are not in a position to heed them. The reasons for such a situation lie partly in the field of political science and partly in the field of psychology. The structure of government evolved is partly necessary and partly optional, whereas the psychological factors cannot be avoided short of the millenuim.

Trustees and agents are equally entitled to instructions. A State legislature by hypothesis is a continuing body charged with the general government. Unless a system of ministerial responsibility prevails, elections to such a continuing body must be at fixed and regular intervals and cannot be left to the discretion of any individual, himself part of the government. Such intervals may have (and I think in our history always have had) no relation to the proposal of amendments by the National Congress. Unless, therefore, the consideration of the proposed amendment is postponed until after the next election the voters have no opportunity of making their wishes known to their representatives. The message is sent over a closed circuit.

This condition was realized and resulted in at least two States seeking to correct it by State constitutional amendment. Missouri and Florida provided in the first constitutions adopted after the carpet bag regime (1875 and 1885) that their State legislatures must not consider an amendment to the United States Constitution unless they had been elected subsequent to submission. In the ratification of the eighteenth and nineteenth amendments similar constitutional provisions were ignored by the State legislatures in several of the States. As we shall see, the

Supreme Court upheld them in so doing. (*Leser* v. *Garnett*, 258 U. S., p. 130.) The Wadsworth-Garrett amendment to article V was designed to meet this Supreme Court case by making such a prohibition part of the United States rather than of the State constitutions.

If the accident of the submission date permits an amendment to be an issue at all in a State legislative election (a coincidence likely to occur only if the proposal is made in the few months preceding November in even-numbered years), there still remains a further impediment to any accurate expression of the popular will. As such a body is charged with the general government of the State, it is inevitable that a multitude of problems must be considered and, ostensibly at least, solved at each session thereof. Because it is a representative body, the tentative solutions become issues on which the voters are asked to express their opinions. As soon as more than one problem is offered for consideration at any one election, the voter is forced to accept a balance of convenience. He must select the candidate who has declared himself for either the greater number of principles with which he agrees or else the candidate who advocates that principle or principles with which he agrees and which he considers most vital. To illustrate, a rich man in Virginia may be more averse to a State income tax than to a bone-dry prohibition law. The air is full of static.

Even if the amendment to be considered should be submitted to a legislature elected on the issue of its ratification or rejection and on that issue alone, the individual member thereof may not be free to obey the mandate there received. This is partly the fault of the experts who selected the illogical bicameral type of legislative body and partly due to our erring human nature.

This is not the place to discuss the historical origins of the two-chambered legislature. Representative Luce in his standard book "Legislative Assemblies" has traced its growth in the Colonies and in the organization of the States. His analysis shows that the bicameral form was not universal at the time of the adoption of the Constitution. It received some impetus from the Federal system (set up, of course, from no preference for that particular form, but, because it was necessary as part of the plan to recognize the sovereign States as geographical units). The lack of any great urban concentration in those days made the system less unequal in its operation. Furthermore, in some cases the difference between the two chambers was not based on the size of the electoral unit but upon some difference or supposed difference in the qualifications of the individual submitting himself for election.

I have used the word "illogical" advisedly. One might well conceive of various differences which could be wisely recognized in the checks and balances of any bicameral system. Intelligence, groups in the community (trade or labor bodies), technical skill (very recently) have been suggested as affording a basis of selection. One might not expect, however, to find Chatham's "blades of grass" accorded a voice in the Government, much less the absolute veto afforded by the acreage basis on which the upper house of nearly every State is chosen. The receiving set has been built to tune out all but certain rural stations.

It has been argued that the needs and viewpoint of a sparsely populated territory are sometimes of a special character requiring special treatment. That is unwillingly admitted. To meet that very condition, the governmental device of local option was devised. This machinery gives each type of territory a qualified instead of an absolute veto over the general legislation. Such a veto is, of course, all that can, in fairness, be demanded.

The exercise of judgment is a matter of character. The psychological element is only germane, therefore, to the trusteeship theory of representation. The human nature of the candidate makes him cling to office. Confucius thus phrased it:

"How can a man serve the prince? When out of office, his sole object is to attain it; and when he has attained it, his only anxiety is to keep it. In his unprincipled dread of losing his place he will readily go all lengths."

The human nature of the voter causes him to concentrate on his own interests (whether of the mind or of the body) rather than upon the general good. As a practical matter this results in the office seeker or holder listening to the voice of enthusiastic minorities. Minorities whose enthusiasm is organized and exploited by the lobby, an institution which it can, I think, be safely said has reached its full flower in this country. The operators at receiving set are deaf to the voice of the good of the greatest number.

The above considerations apply with peculiar force to an amendment such as the eighteenth or a repealer thereof. This, because the problem is one which concerns the people intimately, and its solution calls especially, therefore, for a firm foundation in popular support. The framers recognized this in the sug-

gestion made during the debates on the Constitution for a provision forbidding the Federal Government from making laws affecting "the internal police" of the States. As Professor Lecky, the famous English historian, said in his The Map of Life:

"To responsible politicians the course to be pursued (in the suppression of the drink trade) will depend mainly on fluctuating conditions of public opinion. Restrictions will be imposed, but only when and as far as they are supported by a genuine public opinion. It must not be a mere majority, but a large majority; a steady majority; a genuine majority representing a real and earnest desire. and especially in the classes who are most directly affected, not a mere factitious majority such as is often created by skillful organization and agitation; by the enthusiasm of the few confronting the indifference of the many" (p. 131).

Patently popular support depends upon the fair and free exercise of popular judgment.

The convention is the complete negation of all of the foregoing. So much so in fact that no elaboration is required in demonstration. It derives its existence from the resolution of submission and is consequently elected thereafter. By hypothesis there is only one issue for consideration. The delegates are chosen on that issue and that alone and there is no opportunity for confusion of the voters.

The single act of ratification or rejection is not appropriate for the application of any checks and balances. The convention will be, therefore, single chambered. That one chamber, being freshly created, will have no historical handicap tending to a recognition of acres rather than masses. In fact, the very essence of a convention, its character as the people assembled, should effectually prescribe its election on a "truly representative" basis. Nine out of the eleven original ratifying conventions were so elected. In the other two (of New Jersey and Delaware) the advantage to the small (numerically) States was so manifest that their ratification was assumed.

We have quoted Confucius on the temptations of the officeholder who depends upon popular favor. Perhaps the Chinese philosopher was harsh in his judgment or perhaps he could speak only of the "heathern Chinee." At any rate, those who are not tempted find it easy to avoid sin. Obviously an instructed delegate has only the duty of abiding by the solemn promise on which he offered himself to the electorate. (I think there is only one case on record of a member of the electorate college breaking such a promise.)

A delegate running on the trusteeship theory and reserving therefore the right to exercise his independent judgment finds that judgment unhampered by the selfish considerations which may place the legislator on the horns of that most unpleasant of all dilemmas—duty versus desire. A convention affords no opportunity for reelection. There is then no office to which to cling. The influence of the lobby is at once emasculated and judgment restored to its intended independence.

Professor Beard, that able analyst of our Constitution, has thus summarized this situation:

"Another and perhaps more vital objection to the existing amendment process is that ratification can be effected by a relatively small number of persons who happen to be in the State legislatures at the time a proposition is submitted. In all there are about 7,500 members in the 48 bodies combined. If we group the 36 States with the smallest assemblies together, we find that approximately 2,000 members properly divided between the upper and lower houses can carry or defeat a resolution of amendment laid before them by Congress.

"The number of persons taking part in the ratifying operation is not as significant as the fact that they are only incidentally concerned in it as legislators. They are elected for other purposes. Their main duty is to make laws for the States. Often they are chosen previous to the passage of a proposed amendment by Congress, and are thus asked to decide a matter which was not even before the public when they were candidates. Moreover the type of man found in the legislature is usually not as high as that generally elected to State constitutional conventions. Many people of great ability are willing to serve in a convention for a short period, who would not think of spending any time in the business of ordinary legislation. It is, therefore, not merely the political arithmetic of the amending system which invites criticism. It is to be criticized because it is casual in its nature and does not provide for that special and searching consideration which a change in the supreme law of the land deserves. (Beard, The American Leviathan, the Republic in the Machine Age, p. 43, 1930.)"

POWER—CONSTITUTIONAL ASPECTS

If the Congress admits the validity of the argument for ratifying conventions and decides upon that form of submission, what is their constitutional power in the premises? Can the Congress of the United States call the conventions in the individual States?

Can the Congress prescribe the method of and details for the election of delegates thereto, including by hypothesis the qualifications of the delegates and the suffrage for their election in the States? Finally, can the Congress regulate the proceedings of the conventions when assembled at the State capitols?

A mere reading of these last sentences indicates the extent of the interference with the States required by an exercise of any such power by the Federal Government. If Congress has the power at all, it cannot be limited at any halfway mark such as might be prescribed by a sense of fitness (an indefinite and unsatisfactory gage at best). So a future Congress might submit a repeal of the sixteenth amendment (the income-tax amendment) to conventions elected by those who had paid an income tax in the year preceding the submission, or some form of a child-labor amendment to conventions of manufacturers.

Human judgment, fallible at best, cannot, although it often seems to make the effort, dispense with the facts on which its accurate, wise exercise depends. Hence, the premium on hindsight and the value placed on prophecy in all ages. In languages seeking economy of symbols (see per contra Chinese) words are perhaps not so final as deeds; a certain latitude of meaning is necessary. Out of the attempt to escape their finality and out of their unforeseeability arises much of the work of the courts. Contracts, wills, statutes, all documents inherently designed to operate in the future and upon coming events whose shadows are insufficiently cast before, are constantly laid before judges with the urgent request that the unpredicted (and often unpredictable) element be corrected to fit the actual contingency. Courts generally answer these fumblings with considerable smugness. They talk about adhering to the text, the intention of the parties, etc., and leave us to stew in our own lack of imagination.

The effect of the absence of this all too rare trait, on a rigid structure of government has led the Supreme Court to the rather opposite extreme in constitutional interpretation. They have done almost incredible violence to the plain words of the Constitution, a document notable for its choice of simple and unsynonymous, so to speak, terms. One sympathizes with their motive, an honest desire to give the American people the kind of government the learned justices think they should have. Or as they prefer to phrase it, that which the founders (crystal gazers of 100 years ago) would have desired for the people. It must be a little discouraging to the said justices to have the American people nearly always record an emphatic dissent and so fail to recognize what is good for them. A civil war and the thirteenth and fourteenth amendments repudiated the Dred Scott dictum and a constitutional amendment without a war abrogated the income-tax decision.

Many students of government quarrel with the lack of frankness surrounding the courts' incursions into the field of constitutional amending. We humbly suggested 2 years ago that the Constitution was framed as a formula in political science and should be so construed. That seemed to be more straightforward and more acceptable to the people. If the latter objected, their government would at least not be whittled at by indirection.

However, that may be, there are five accepted (by the Supreme Court) canons of constitutional interpretation. We seek to find what is indicated by the four corners of the instrument and its reasonable inferences and implications, the technical terms therein, the contemporaneous interpretation thereof, the debates in the constitutional convention thereon, the history of the times and finally and rather vaguely, the spirit of the Constitution.

The Constitution mentions five kinds of representative bodies: The electoral college, the Congress, State legislatures, and two types of conventions, a convention for proposing amendments and a convention for ratifying amendments. The Constitution does more than mention all but the State legislatures and the ratifying conventions. In each of the other cases it makes some regulatory provision.

The Electoral College is governed by article II which says, "each State shall appoint (electors) in such manner as the legislature thereof may direct." The debates in the constitutional drafting convention indicate that this was a neat compromise between those who favored direct election by the people and those

who desired the choice to be made solely by the State legislatures. (Elliot's Debates—various references.)

Article I, section 4, clause 1 of the Constitution provides that:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators."

A motion to strike the last phrase from the clause was made in the convention by Pinckney, and it was only retained after an earnest plea from Madison. In the ratifying conventions also it met with violent opposition, and the dissenters had to be calmed by assurances that it was intended only to apply in cases where the State legislatures refused to act. An intention incidentally that the passions of the Civil War caused first the Congress and then the courts to ignore.

It is provided in Article V of the Constitution that the Congress shall call the proposing convention. Here again the assiduous Madison had his say and expressed the very same fear now current:

"Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States, as to call a convention on the like application. He saw no objections, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided."

This fear failed to terrify the framers. They adopted none of the precautions suggested by their more timid colleague.

What constitutional deductions should we make from these words and this silence? In the first place it is clear that the founders regarded the prerogatives of States' legislatures with a jealous eye. They gave them complete power over the election of the electoral college and primary control over the election of the Federal legislature. Their concession to (consolidation) here was bitterly criticized and their original intention distinctly emasculated in consequence. It is true that they seem to have forsaken that position in respect to the proposing convention. As we shall see later, this exception is a powerful argument for a constitutional intention to leave the ratification convention to the State legislatures.

It is clear that the framers took good care to provide expressly for the elction to those representative bodies provided for in the Constitution which were new and accordingly unfamiliar. This would be the course followed by sensible men. State legislatures and State conventions were part of the daily life of the people—almost as much so as the town meeting. No one needed to be told how to elect, convene and conduct them. Madison troubled to express his doubts about the novel national convention—he felt no need for discussing the familiar State ratifying conventions. How absurd then to have the new methods expressly intended for new bodies made applicable by implication to old bodies for whose governance the old methods were adequate.

What is indicated by the extrinsic evidence as to the technical term "convention" used in Article V? In less legal language what was the meaning usually attached to that word at the time the Constitution was framed by those who framed and adopted it?

An examination of this evidence and that meaning leaves us in very little doubt. A convention was in fact a better-known institution in 1788 than a legislature. The explanation for this lies in the history of the colonial governments and their struggles, both with the King's governors and finally with the King. The details of such history are too numerous for exposition here. It can best be summarized by quoting first Judge Jameson (whose book on Constitutional Conventions, first published in 1867, is still the leading authority) and second Professor Dunning, a more modern student of the subject. So Judge Jameson says:

"The history of that institution may be summed up in a few words: it is an adaptation to the exigencies of constitutional life and government, in the United States, of the revolutionary convention, as derived from our English ancestors of 1660 and 1689."

And Professor Dunning:

"In the primary group, however, the particular commonwealth, the Americans manifested in one respect a very great clarity of democratic analysis. The framing of their constitutions they insisted should be the particular functions of a special organ, distinct from the Government and immediately representative of the people. Thus the Constitutional Convention came into the field of law and of philosophy."

The constitutional convention was then in its very essence a medium for the expression of the people's will. It was resorted to whenever it was thought wise to secure their opinion directly and surely, and was used for that purpose instead of the colonial or State legislature. So the de facto governments of the revolting colonies brought about the establishment of written constitutions, by either the convention method or by a combination—convention legislature. So, also the framers realizing the absolute necessity for popular support for the constitution, referred it to State conventions for ratification. No one would maintain that the framers considered that the word legislature meant a body whose election, proceedings, etc., are regulated from above and outside of the State whose governing body it was. A fortiori then the framers did not so consider this the meaning of the word "convention." It was rather to them the epitome of local self-government. A body created because of its very immunity from any such denial of popular sovereignty. It would be much more logical to say that the extrinsic evidence excluded the bicameral acreage legislatures interpreting the other branch of the alternative.

The members of the drafting convention were immediately, upon the ending of their labors, faced with our very problem. They decided, as we have seen, upon ratification by conventions. The Constitution came from the people, it was to go back to them for approval. Do we notice any trace of that hesitation as to procedure which now confronts us? The question was apparently of a simplicity unworthy of discussion. The submitting resolution was quite specific and reads:

"*Resolved*, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention, that it should afterward be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same, should give notice thereof to the United States in Congress assembled." (This resolution was signed by George Washington on Monday, September 17, 1787. Elliot's Debates, vol. 1, p. 16.)

The contemporaneous interpretation is in favor of power in the State legislatures.

There was some desultory discussion in the debates on the Constitution as to the respective merits of legislatures and conventions. The preponderant opinion was for the latter. In such talk there was never a suggestion that a convention was to be Federally called, organized, and directed. Even when Madison brought up the question of such direction and deplored the lack of it, no one uttered the thought that it should be done by Congress. Having stood mute when the occasion called for speech, we are justified in assuming that it was the intention of the framers to leave any such power out of the Constitution and not, therefore, to any constitutionally created agency.

Whatever the motives of the colonists (historical research and appraisal of recent years has cast some doubt on their actual as compaired with ther theoretical altruism) in objecting to interference from England there can be no question of the sincerity and intensity of that objection. Its inevitable counterpart, a passion for local self-government, as is well known, nearly wrecked the country newly set free of that interference. The history and failure of the confederation and their result in the Convention for the writing of a constitution need not be retold here.

Suffice it to say that the fear of "consolidation" as it was called by the statesmen (politicians) of the time, or centralization as we should call it, persisted and necessarily influenced the decision of the framers and limited the form of government they finally were able to agree upon and recommended for adoption. The relation of local elections to local self-government requires no elaboration. The history of the times in short makes it perfectly clear that the framers had no intention of giving the local elections for altering the consolidated government into the hands of a branch of that government.

By definition, a rigid constitution is adopted or changed by methods other than those of ordinary legislation. Otherwise, of course, the legislative fiat is the constitution. In a federation, the method is naturally bilateral—the Nation on one side and its component sovereignties on the other. To break down the dual character of such an arrangement destroys the rigidity of the document and therefore its role as a constitution. To give to Congress the power to dictate as to ratifying conventions or per contra to the State legislatures the power over a proposing convention, would accomplish exactly that. The framers realized that. They carefully provided in article V that Congress should have power over a proposing convention (p. 20). Are we going to fail to realize it and by providing for congressional control over ratifying conventions not only belie the spirit of our Constitution but that of all similar basic documents?

We have now tested the word convention as contained in article V by all of the accepted canons of constitutional interpretation. Each of them overwhelmingly demonstrates that it does not mean a convention called, elected, organized and governed by congressional fiat. But that on the contrary it does mean a convention in which these four matters are attended to by the State legislatures. Upon what arguments then do those who earnestly press the first rather than the second view rely? Rather to our surprise they advance only the dicta of three Supreme Court cases decided just after the passage of the eighteenth amendment and the nineteenth amendment. (*Hawks* v. *Smith*, 1920; *Dillon* v. *Gloss*, 1921; and *Leser* v. *Garnett*, 1922.)

I feel none of the scorn that lawyers waste upon that form of judicial outgiving. It would seem to me that what a judge says should be tested rather by its inherent wisdom than by any supposed relation to the irreducible minimum. Everything in a court's opinion except "judgment for the plaintiff," "motion granted," or "bill dismissed" is in one sense dictum. The theory is, of course, that a jurist becomes careless in proportion to his remoteness from what he must say to name the winner. The broomstick becomes more brittle at the end. At any rate, let us analyze these cases and see if they offer any real support for an exercise of congressional power.

Dillon v. *Gloss* (256 U. S., p. 368, decided May 16, 1921) was a direct attack (by the writ of habeas corpus) on the validity of the eighteenth amendment. The ground chosen was the 7-year time limit on ratification imposed by the Congress in the submitting resolution. The court sustained the amendment. As it was ratified within and not after 7 years, the petitioner could hardly claim injury. The particular dictum within a dictum is found in the phrase: "speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification" (256 U. S. 376).

The court decided that article V by implication reads "when ratified within a reasonable time to be fixed by Congress." The first implication seems fairly obvious. The necessity for reflecting the will of the people contemporaneously almost demands such an interpretation. We can see no ground for the second or pyramiding inference giving Congress the power to say what is a reasonable time. By ancient precedents the courts are quite capable of themselves determining a reasonable time and require no help from legislative bodies or otherwise.

The learned court apparently had some misgivings about the matter, because they attempt to tie this last implication to some express words. As the only mention of Congress occurs or is in connection with the choice of alternative methods, the only available words lie in its power to propose the one or the other. It seemed to make no difference to the court that this choice of alternative had no conceivable relation to any limitation in time of ratification. Clearly the problem of time applies equally to either mode of ratification and not, therefore, to a selection between the two.

Because the court has, as we think unfortunately, added the time detail to the power to propose an alternative, it is argued that Congress may ascribe any other details it fancies to the same power. This does not follow and for a very simple reason. The court in the case of *Dillon* v. *Gloss* considered a time limit was reasonably inferrable and then went on to the further implication we have just criticized. On a parity of reasoning to give Congress the power now contended for, we would have to first infer the general power to prescribe ratifying conventions and the perhaps *Dillon* v. *Gloss* would be authority for the power to carry out the details of that power. In brief, the neo-Federalists, if I may so call them, have omitted the very step in controversy and have attempted to beg it by deduction from its superstructure.

In *Hawke* v. *Smith*, 1920 (253 U. S., p. 221) and *Leser* v. *Garnett*, 1922 (258 U. S., p. 130) several States had constitutional provisions which attempted to secure that more effective expression of the popular will in ratification we have talked so much about. The respective legislatures had proceeded to ratify without regard to these provisions. The people of the State attempted to make the ratifying legislature a particular kind of legislature (in the one case whose action had been approved in advance by a referendum and in the other one elected after submission). The Supreme Court held this could not be done. The court in both cases observed that the power (function) of ratifying an amendment "had its source in" ("was a Federal function derived from") the Constitution—a truism which one must, of course, agree. That being so, the people of the State could not change the constitutional terms and either call themselves a State legislature or admit the validity as a State legislature of a body elected at a particular time.

In other words these cases declare, what would readily be conceded, that the Constitution is paramount in the field of the amending power as elsewhere. How this advances any supposed power of Congress is not clear. We are seeking that power in the Constitution and it does not reveal its hiding place to say that, if it is there, it will be paramount. Only another begging of the question in fact.

We can hardly believe that any reliance is placed on the phrase "Federal function" used by that most exact of judicial writers—Judge Brandeis. It seems hardly necessary to say that Federal does not mean congressional. In the nature of things the legislative branch has many of the powers of government intrusted to it and so many Federal functions are assigned to Congress. So equally, however, are all the executive and judicial powers of the National Government Federal functions. The President in appointing Judge Parker, the Senate in refusing to confirm him, and his "substitute" in writing the opinion of the court which corrected me 2 years ago, were all acting in their Federal capacities and in performance of their Federal functions.

PROCEDURE—TECHNICAL ASPECTS

Having decided upon ratification by conventions and having further agreed that such conventions must be called, elected, and convened under the supervision of State legislatures, what should be the procedural details? We have been surprised at the tendency in some quarters to create and magnify difficulties here.

I refer again to the legal gentry's beloved precedents. I have been agreeably surprised to find that here anyway the pastures are green indeed. The resolution submitting the original Constitution one would expect of course to find easily. It is readily available in Elliot's Debates and has already been quoted on page 24.

One might have been afraid that the source material of the ratifying conventions would not be so carefully preserved and so conveniently locatable. Happily that is not the case. The Library of Congress and other libraries (legal and general) contain the legislative resolutions calling the conventions and providing for the election of the delegates thereto. Numerous newspapers and pamphlets giving accounts of such elections are on file. The proceedings of the new conventions are to be found in Elliot and elsewhere. This original material has been gathered, analyzed, and summarized in several books. I have read three myself in recent months. They are: The History of the Virginia Federal Convention of 1788, Grigsby; The Contest Over the Ratification of the Federal Constitution in the State of Massachusetts, Harding; and Pennsylvania and the Federal Constitution, McMaster and Stone.

I do not need to mention, of course, the precedents governing constitutional conventions generally. About 125 have been held in our history. A bibliography in the Princeton library gives 6,000 documents. As a matter of fact the Supreme Court in one of the cases (*Leser* v. *Garnett*) cited has held the ratification by the State and the acceptance by the Secretary of State of the appropriate certificate is conclusive on questions of procedure in ratifying legislatures. There would hardly be a different ruling on ratifying conventions. That would seem to make such questions of procedure, academic.

I have asked the legislative drafting bureau of Columbia University Law School (Professors Chamberlain and Dowling) to draw up a simple resolution for the calling of a convention, the election of its delegates, and the proceedings of the convention. Senator Richards, the president of our senate has agreed to introduce it in the New Jersey Legislature. A general outline of such a resolution was prepared by me and submitted to the Columbia bureau. Its provisions were about as follows:

The delegates to the ratifying convention are to be elected at the next statewide (whether primary or general) election after the submission by the secretary of state. The delegates are to be chosen from the same districts, in the same numbers, and by the same voters as the members of the lower house of the State legislature. In practically all of the States such house is elected on a population basis.)

The candidates for the office of delegate are to be nominated by petition. Each petition must have signed thereto names of qualified voters equal to 5 percent of the population of the district in which the election is to be held. In circulating his or her petition the candidate for delegate must declare himself or herself in favor of ratification, against ratification or uninstructed - that is prepared to exercise his or her individual judgment for or against ratification.

The names of those persons for whom the necessary petitions are filed will be placed on the ballot under the one of three designations above declared for by them. In districts electing more than one delegate all the votes of the candidates under one designation (for instance ratification) will be counted and divided among the leading candidates to a number equal to the quota for the particular district—that is, if your district is entitled to three delegates all the ratification votes will be divided equally among the three ratification candidates actually receiving the largest number of votes.

This last is simply a device to avoid the necessity for a nominating primary. It is legitimate because there is only one issue before the voters. They are not, therefore, compelled to express their preliminary general preference among conflicting issues. The uninstructed "ticket" is provided because we cannot foreclose from the voter the trusteeship theory of representation and force upon him the conduit pipe or mandat imperatif view. In less technical language, he is entitled to select persons to do his thinking for him or he may do it unaided by the intelligence of delegates. Obviously the instructed delegation is only a cumbersome form of referendum. We are not concerned with that. It is implicit in any system which does not provide for a direct vote of the people on measures as well as on men and which does not forbid instructions. The electoral college is another instance of the same theory under our Constitution.

These seem to me the principal requirements of any enactment for a State ratifying convention. Other details may be noticed. The joint resolution requires no signature from the governor. This answers the rather far-fetched suggestion that particular executives would refuse to act. The existing state corrupt practices act should be made applicable or even strengthened. The date of convening should be fixed. A standard manual of parliamentary law and procedure should be prescribed to govern the proceedings after convening.

It has been said that these mechanical preparations for the machinery of ratifying conventions will be expensive. In fact, such unusual figures as 15,000,000 are mentioned to excite our depression-shocked minds. I estimate the expense per State as about $2,000. We budget this expense as follows:

The election machinery by hypothesis is already in operation. There seems no reason for a special election. The delegates to the ratifying convention are running on a separate and distinct issue and it surely cannot be contended that the voter is only capable of voting yes or no on one issue at a time or that his powers of considering governmental problems are exhausted when he picks the local coroner. As is well known, the most important State constitutional issues are regularly placed on the primary and general election ballots.

It is said that the necessity for speed requires a special election. In estimating time it is, of course, only fair to consider the alternative method of legislative ratification. It has been the experience in the past that a State legislature ratifies only at its regular session. As the present Congress may not agree on any form of resolution, legislative ratification may be 2 years away. The unanimously agreed to twentieth amendment required all of 1 year for legislative ratification. A special session to issue a convention call would, as it requires no particular time or effort, probably be obtainable upon submission. The conventions could then be elected within 2 years and, being called for a special purpose, would obviously act upon election.

The nominating petitions would require a modest amount of printing, the delegates might be awarded an equally modest amount per diem (2 days should complete their business, and they would probably consider it an honor to serve), the meeting place would be a public building, and there would be some railroad fares.

In all, as we said, about $2,000. No great expense to obtain the real opinion of the people upon the most vexatious, important question of our generation. No great expense to inaugurate a system of amending our Constitution which will insure such an accurate expression of the popular will for all time to come.

Respectfully,

WILLIAM CLARK.

Senator CONNALLY. Fundamentally, the Federal Constitution is a Federal Constitution, and that Constitution has the exclusive right to say how it shall be amended. It is purely a Federal function, it seems to me.

Judge CLARK. Possibly that is an extreme case. Suppose the Federal Congress should say the vote should be cast only by men over 40. Do you think they would do that?

Senator CONNALLY. No.

Senator NORRIS. We are very much obliged to you, Judge Clark.

Judge CLARK. Thank you for the privilege of appearing before the committee.

Senator NORRIS. Is Mr. Trevor here?

He is President of the American Coalition, with offices in the Southern Building in this city. I have a telegram which he sent to Senator Ashurst, which I shall read:

JANUARY 18, 1938.

Hon. HENRY F. ASHURST,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.:

On behalf of the American Coalition permit me to submit to the members of the Committee on the Judiciary of the United States Senate the following brief argument against the adoption of Senate Joint Resolution 134. An examination of the debates of the Constitutional Convention of 1787 clearly discloses the fact that the members were thoroughly advised as to the reasons for the breakdown of popular government in every republic of which history has record prior to the establishment of the United States. The fundamental cause of this failure of democracy in past ages was the outburst of popular passion whipped to white heat by extravagant appeals of unscrupulous demogogues. It was to guard against such an eventuality that the existing checks on reckless action under stress of a sudden emergency were incorporated in the Constitution of the United States. The break-down of parliamentary forms of government throughout the world in the past decade should serve as a warning to the American people that any weakening of the fundamental law under present critical conditions is equivalent to an invitation to the Fascist, the Nazi, or Communist agitator to arouse social discord and incite class antagonism, for the purpose of seizing control of the United States and putting a dictator at the head of its affairs. In the light of these facts it is hoped that the Committee on the Judiciary will report adversely on Senate Joint Resolution 134.

JOHN B. TREVOR,
President, American Coalition.

Senator AUSTIN. In the letter of Judge Clark's he quotes the Harvard Law Review, referring to volume 41, No. 3, page 473. It is rather long. I presume we can get one or more copies.

Senator NORRIS. Does anyone wish to be heard?

(After a brief discussion off the record, the subcommittee adjourned until Wednesday, January 26, 1938, at 10:30 a. m.)

RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY POPULAR VOTE

WEDNESDAY, JANUARY 26, 1938

UNITED STATES SENATE,
SENATE JUDICIARY COMMITTEE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10:30 a. m., in the committee room, Capitol.

Present: Senators Norris (chairman) and Senator Austin.

The CHAIRMAN. The committee will come to order. I have a telegram here, directed to the chairman of the Judiciary Committee, signed by Mr. Trevor. Is he present?

Mr. TREVOR. Yes, sir.

The CHAIRMAN. Do you want to be heard?

STATEMENT OF JOHN B. TREVOR, PRESIDENT, AMERICAN COALITION

Mr. TREVOR. I want to appear very briefly and ask for a postponement, in view of the importance of the matter. We recognize the present procedure is susceptible of improvement. We think it desirable, however, to have 3 weeks, if the committee will permit, for preparation of an adequate presentation of our position. We believe some research on the question would probably be helpful to the committee, and we believe that judicial consideration of the matter demands time.

The CHAIRMAN. There is only one objection I see to that. This resolution, if submitted, will have to pass the Senate and the House, and with the condition of business in the two Houses, it ought to be put on the calendar without any unreasonable delay. The only objection I have to such a procedure, a 3 weeks continuance of this, would be that we are going to delay it until we will not have time to pass it at this session of Congress.

You are chairman of the Committee on Republican Integrity?

Mr. TREVOR. No, sir; you have the wrong document.

The CHAIRMAN. I see; that is another one.

Mr. TREVOR. Mine was a long telegram, to which Senator Ashurst replied, and he said he felt sure the committee would be glad to hear me at any time I chose.

The CHAIRMAN. I would be glad to hear you.

Mr. TREVOR. We have taken the position there that it is necessary to have immediate action. I personally recognize the present system is susceptible of improvement. We do not take an antagonistic attitude, but we generally object to the resolution in its present form.

In order to have an adequate consideration of it, we would like to have the time to study it, and we think the more publicity, as a matter of fact, the people in this country obtain on this matter, the better because it certainly is a very vital matter, and we feel the people should have an opportunity to know the amendment is going to be presented by your committee.

The CHAIRMAN. You represent an organization?

Mr. TREVOR. Yes, sir. Would you care to have a list of the societies associated with the coalition?

The CHAIRMAN. You may file it for the record.

(The list referred to is as follows:)

SOCIETIES COOPERATING WITH THE AMERICAN COALITION

Aeronautical Association of America, Inc.
Allied Patriotic Societies, Inc.
American Coalition of New York.
American Defence Council.
American Vigilant Intelligence Federation.
American War Mothers.
American Women Against Communism.
American Women's League.
American Women's Legion of the World War.
Associated Chapters, Order of DeMolay of Pennsylvania.
Associated Farmers of California, Inc.
Auxiliary, Sons of Union Veterans of Civil War.
Aztec Club of 1847.
Better America Federation of California.
California Society, Order of the Founders and Patriots of America.
Colonial Order of the Acorn, New York Chapter.
Congress of States Societies.
Dames of the Loyal Legion of the U. S.
Daughters of America, National Council.
Daughters of America, District of Columbia Council.
Daughters of the Defenders of the Republic.
Daughters of Union Veterans of the Civil War, 1861–1865.
Defenders of the Constitution of U. S.
Descendants of the Signers of the Declaration of Independence.
Disabled American Veterans of the World War.
D. C. Society, Order Founders and Patriots of America.
First Motor Corps Unit No. 12, Mass. State Guard Veterans.
General Court, Order of the Founders and Patriots of America.
General Pershing Chapter, American War Mothers.
General Society of Mayflower Descendants.
General Society of the War of 1812.
Government Club, Inc.
Immigration Restriction Association.
Immigration Study Commission.
Industrial Defense Association, Inc.
Junior American Vigilant Intelligence Federation.
Junior Order United American Mechanics, New Jersey.
Ladies of the Grand Army of the Republic.
Larchmont Colony, National Society of New England Women.
Louisiana Coalition of Patriotic Societies.
Massachusetts Society, Order of the Founders and Patriots of America.
Massachusetts Women's Constitutional League.
Military Order of Foreign Wars of the U. S., National Commandery.
Military Order of the Loyal Legion of the United States, Commandery in Chief.
Military Order of the Loyal Legion of the United States, Commandery of the District of Columbia.
Military Order of the Loyal Legion of the United States, Commandery of the State of New York.
Military Order of the Loyal Legion of the United States, Commandery of the State of Pennsylvania.
Military Order of the World War.

Minute Men of America, Inc.
National Auxiliary, United Spanish War Veterans.
National Camp, Patriotic Order Sons of America.
National Commandery, Naval and Military Order of the Spanish American War.
National Constitution Day Committee.
National Corps, Army and Navy Union of the United States of America.
National Council, Sons and Daughters of Liberty.
National Patriotic Association.
National Patriotic League.
National Security League, Inc.
National Society, Daughters of the Revolution.
National Society, Daughters of the Union, 1861–1865.
National Society of New England Women.
National Society 1917 World War Registrars, Inc.
National Society, Service Star Legion.
National Society, Sons and Daughters of the Pilgrims.
National Society, Sons of the American Revolution.
National Society, United States Daughters of 1812.
National Society, Women Descendants of the Ancient and Honorable Artillery Company.
National Woman's Relief Corps.
New England Protestant Action League.
New Jersey Society, Order of the Founders and Patriots of America
New Jersey State Society, Daughters of the Revolution.
New York City Colony, National Society of New England Women.
New York Society, Order of the Founders and Patriots of America.
Nonpartisan League of Women, Inc.
Old Glory Association.
Old Glory Club of Flatbush, Inc., Beacon No. 1.
Order of Colonial Lords of Manors in America.
Order of Independent Americans, Inc., State Council of Pennsylvania.
Pennsylvania Society, Order of the Founders and Patriots of America.
Philadelphia Protestant Federation.
Protestant Women's National Civic Federation.
Reserve Officers Association of the United States.
Reserve Officers' Training Corps Association of the United States.
Rhode Island Association of Patriots.
Rhode Island Daughters of the American Colonists.
Rochester District, American Coalition.
Society for Constitutional Security.
Society of Colonial Wars in the District of Columbia.
Society of Colonial Wars in the State of New York.
Society of New York State Women.
Society of the Daughters of the United States Army.
Society of the Sons of the Revolution in the Commonwealth of Massachusetts.
Sons of Union Veterans of the Civil War.
Southern Vigilant Intelligence Association, Inc.
State Council (D. C.), Sons and Daughters of Liberty.
The American Indian Federation.
The Christian American Crusade.
The Federation of Huguenot Societies in America.
The Order of the Three Crusades.
The Paul Reveres.
The Wheel of Progress.
United Daughters of the Confederacy, New York Chapter.
United States Aviation Cadets, Inc.
United States Naval Reserve Officers Association.
Veterans of Foreign Wars of United States, Department of Delaware.
Veterans of Foreign Wars of United States, Morley S. Oates Auxiliary No. 701.
Westchester Security League.
Wisconsin Chapter, Daughters of Founders and Patriots.
Woman Patriot Corporation.
Woman's Pioneer Aircraft Association of Chicago, Inc.
Women's National Defense Committee of Philadelphia.
Women of Army and Navy Legion of Valor, United States of America.

The CHAIRMAN. You may proceed.

Mr. TREVOR. Since that telegram was sent we had the annual convention of the coalition, which was held yesterday. This matter was there considered, and I was requested by my association to ask for a continuance. A number of persons present desire to have their names appended to that telegram, with a designation of the organizations they represent.

The CHAIRMAN. What organizations are they?

Mr. TREVOR. It is a coalition of 112 patriotic societies.

The CHAIRMAN. Those societies, you say, met yesterday?

Mr. TREVOR. We had the annual convention yesterday and delegates from those societies were present.

The CHAIRMAN. Did they take action on this amendment?

Mr. TREVOR. They considered it very fully. The amendment was read to them and carefully explained by various gentlemen present, and the desire of the organization was—they support the amendment in the first place, but they felt it was very desirable that there should be time for an adequate presentation and argument.

The CHAIRMAN. Where was this annual convention held?

Mr. TREVOR. At the Carlton Hotel yesterday.

The CHAIRMAN. How many delegates were present?

Mr. TREVOR. There were 178 people present.

The CHAIRMAN. Were all the organizations you have on that sheet represented?

Mr. TREVOR. I haven't been over the record carefully. I could advise you, through the secretary, how many societies were represented there, but not at the moment.

As I say, I came here really to ask for this continuance, in the hope we would have time to supply all the societies with full informtion on this matter. .

The CHAIRMAN. I haven't even counted these organizations that you represent in the coalition.

Mr. TREVOR. There are 112.

The CHAIRMAN. How many?

Mr. TREVOR. One hundred and twelve.

The CHAIRMAN. One hundred and twelve organizations. How many members does each organization have?

Mr. TREVOR. Some of the organizations are very large. Of course, under present conditions, with the depression, some of them have lost members. The aggregate membership runs possibly over 2,000,000.

The CHAIRMAN. Could it be fairly stated that you represent 2,000,000 people here now?

Mr. TREVOR. I think it can be fairly stated that we represent the societies listed there whose delegates attended our annual convention.

The CHAIRMAN. There are so many of them I have never heard of. For instance here is one, Old Glory Association. What kind of an organization is that?

Mr. TREVOR. A patriotic society. They all are.

The CHAIRMAN. How many members does the Old Glory Association have?

Mr. TREVOR. I could not tell, offhand, sir.

The CHAIRMAN. Another one is the National Society of Women Descendants of the Ancient and Honorable Artillery Company. How large an organization is that?

Mr. TREVOR. As I said to the chairman, at the moment I am not prepared to supply you with a list of the number of members.

The CHAIRMAN. Here is the National Women's Relief Corps, New England Protestant Action League, New Jersey Society, Order of Founders and Patriots of America, and here is the New Jersey State Society, Daughters of the Revolution, Nonpartisan League of Women. Is that the Nonpartisan League of Women Voters?

Mr. TREVOR. No, sir.

The CHAIRMAN. Here is another one called the Louisiana Coalition of Patriotic Societies. That, in turn, is composed of a lot of other societies?

Mr. TREVOR. That is a local State aggregation of patriotic societies or groups associated with the coalition.

The CHAIRMAN. Here is the Junior Order of American Mechanics. How many do they have in their organization?

Mr. TREVOR. Of New Jersey, isn't it?

The CHAIRMAN. Yes.

Mr. TREVOR. That, I think, has about 30,000 members.

The CHAIRMAN. Were they represented yesterday in the annual meeting?

Mr. TREVOR. I can't tell you whether their delegate was present or not. There were 178 people present in the room.

The CHAIRMAN. Here is the Military Order of the Loyal Legion of the United States. How large an organization is that?

Mr. TREVOR. I could not tell you, sir, the membership. They were represented yesterday.

The CHAIRMAN. The Military Order of the World War, Minute Men of America, National Auxiliary, United Spanish War Veterans.

I don't see any objection to any of these organizations being heard, but I dislike the idea of continuing this indefinitely, for fear that we will continue it out of existence.

Mr. TREVOR. That is not the desire, sir, at all, but we feel, as you are probably aware, that the public has only been advised of this resolution very recently, and the newspaper publicity has been very limited. I only heard it a few days ago myself. Then I took it up with the executive committee and sent Senator Ashurst that telegram and he responded as you have there in his telegram, which is on your table.

The CHAIRMAN. I would be very glad indeed to have you suggest any changes that you think of to be incorporated into this bill, whether favorable or otherwise. That is the object of these hearings.

Mr. TREVOR. May I say to the Chair that, personally, I think it is unfortunate to have a snapshot opinion. I have some ideas regarding this subject, but I would certainly prefer to present to you a carefully studied opinion, with possible recommendations for amendment of this resolution, rather than appear before you and just simply take a definite position in opposition.

The CHAIRMAN. The resolution itself is very short. It is a question that has been before the American people for generations.

Mr. TREVOR. It has been before the courts in Kentucky and Kansas, and we get a divergent opinion of the courts on the question.

The CHAIRMAN. I think I know the court decisions you refer to in Kentucky and Kansas, but as I see it those decisions have nothing on earth to do with this resolution.

Mr. TREVOR. No, but they show we have very divergent viewpoints. Not on this resolution, but on existing conditions.

The CHAIRMAN. Those two decisions were on the child-labor amendment, were they not?

Mr. TREVOR. They relate to the——

The CHAIRMAN. And they were directly opposite.

Mr. TREVOR. They relate, as I understand it, and I want to study those decisions. That is one of the reasons I ask for a postponement, because it seems to me, as I understand the gist of them, they deal with the effective date of the operation of an amendment by the people. As I say, Senator, I do not feel prepared to go on now.

The CHAIRMAN. One of these decisions is to the effect that the child-labor amendment now pending before some legislatures is so old that the time is unreasonable, and it does not make any difference whether they approve it or not; it is really outlawed. The other is the reverse of that.

Mr. TREVOR. That is what I understand, sir.

The CHAIRMAN. That is one of the things we want to cure by this amendment.

Mr. TREVOR. It is one of the things we want to study, with a view to recommendations.

The CHAIRMAN. If you study it forever, we will never cure it.

Senator AUSTIN. Will you allow me to make a suggestion at that point?

The CHAIRMAN. All right, sir.

Senator AUSTIN. I have both decisions here and have analyzed them very carefully, and I think the essential point of disagreement between them is this; that the *Kansas case* turned upon the holding that rejection of an amendment is not final.

The CHAIRMAN. Yes, that is right, Senator.

Senator AUSTIN. Whereas, the *Kentucky case* held that rejection as well as assent is final. Both States agreed that assent is final, but the point of difference is on rejection.

The other question which the chair has mentioned was discussed and both agreed that ratification should have relation to the sentiment and felt need of the times, and therefore our policy ought to be to have a limitation on the time of submission which is reasonable in length, so that it will be adapted not only to the thought of the times, but also to the number of States then in existence, point out that some of these old amendments that were associated with the original 10 are still hung up, and the question actually is raised; three-fourths of how many States are required to ratify them today; that is three-fourths of the original 13, the then number, or three-fourths of 48?

The CHAIRMAN. Senator, all that difficulty would be cured if this resolution were passed.

Senator AUSTIN. That is one of our difficulties in these hearings. Will the chairman permit me to say something on this question before him?

The CHAIRMAN. Certainly.

Senator AUSTIN. I have been striving to get together material for our record, in the hope that we might afford, with our printed record an easy access for Senators whom I know are busy and cannot spend the time in research, easy access to the history and bibliography and philosophy that underlies the Senator's proposal. It is really amazing

how much there is of it. I suggest for the consideration of the chairman that 3 weeks would not be too much for our own use for this purpose. I have rushed my study as much as possible, possibly too much, and I think it would be in the interest of the amendment to have this postponement.

The CHAIRMAN. Senator, from my experience here, this is what I anticipate. At the end of 3 weeks there will be somebody else here who will say, "I want 3 weeks or a month." If each one of them come in and ask for time to be heard, this whole batch of organizations, it would be 3 or 4 years before we get through with these hearings.

Senator AUSTIN. I think that would be within our discretion.

The CHAIRMAN. I realize that. I don't want to use any arbitrary discretion, however, to shut off debate.

Mr. TREVOR. May I make a suggestion?

The CHAIRMAN. Yes.

Mr. TREVOR. It seems to me if I obtain, through your courtesy, a continuance of 3 weeks, any society that is listed there, whose delegates were represented at the convention, would be estopped from asking more time.

The CHAIRMAN. No, no; that doesn't stop them from asking it, and I don't want to curtail them, either. I want to be reasonable about it.

Mr. TREVOR. They very clearly expressed the sentiment yesterday that you have raised a very important issue, and our organization, as I said, does not want to present a snapshot opinion on the question. We are opposed to the amendment in its present form. We believe it should be altered substantially to prevent the situation developing that I mentioned in the last part of my telegram. But we do not feel that an adequate study can be made in less than 3 weeks.

The CHAIRMAN. I have not read your telegram. It was not addressed to me. Suppose we put your telegram in the record at this point. That is the basis of your request.

Senator AUSTIN. It was put in, Senator Norris, at our last meeting.

Mr. TREVOR. Yes, the Senator put it in and then wired me.

The CHAIRMAN. You say, among other things, in this telegram:

> The break-down of parliamentary forms of government throughout the world in the past decade should serve as a warning to the American people that all weakening of the fundamental law under present critical conditions is equivalent to an invitation to the Fascist, the Nazi, or the Communist agitator to arouse social discord and incite class antagonism for the purpose of seizing control of the United States and putting a dictator at the head of its affairs. In the light of these facts it is hoped that the Committee on the Judiciary will report adversely on Senate Joint Resolution 134.

Do you think that this resolution is going to incite revolution?

Mr. TREVOR. No, sir; that is not what I said.

The CHAIRMAN. Well, "* * * is equivalent to an invitation to the Fascist, the Nazi, or Communist * * *." Do you suppose they are interested in this resolution; or do you suppose any one who favors it is acting in behalf of the Nazis?

Mr. TREVOR. Oh, no.

The CHAIRMAN. Or Communists?

Mr. TREVOR. No, no; Senator. Please don't understand me as implying anything like that. What I said was we have in this country Nazi agitators and Communist agitators, heading up organizations——

The CHAIRMAN. We will always have that, no matter what kind of Government we have, and I haven't any more sympathy with them than you have.

Mr. TREVOR. We didn't suppose for a moment that you had the slightest sympathy for those people.

The CHAIRMAN. If you make a Constitution that cannot be amended and there is no way to change it and a thousand years from now we have got to straight-jacket ourselves——

Mr. TREVOR. We don't contend for that.

The CHAIRMAN. Then you have an invitation to all kinds of disloyal people to organize and try to overthrow the Government, and they would be pretty nearly justified in doing so, because everybody, it seems to me, ought to realize that a statute or a constitution or anything in one generation may be perfect, and yet may not be desirable in a 100 years from that time, to the same people, or to their descendants.

Mr. TREVOR. We recognize that fact, Senator, but the point I seek to make in that telegram on behalf of the organization, which my associates concurred in yesterday, is that we believe that presumably you may modify or accept amendments to this resolution.

The CHAIRMAN. Oh, yes; I invite amendments.

Mr. TREVOR. And it is for the purpose of offering constructive suggestions that we ask time for study. If the resolution has to stand as it is, we are forced to take a position in opposition.

The CHAIRMAN. I am not finding fault with the man who opposes it. That is a right he has that I would not take from him under any circumstances.

Mr. TREVOR. We think there are features of the resolution as it now stands that demand most careful study and amendment, and it was with a view to making a careful study, and not making a snapshot opinion on it that I have asked a continuance of 3 weeks. That is our position now.

The CHAIRMAN. It doesn't seem to me you need 3 weeks to do that. I have an idea you could do it right now. You can make just as good an argument right now as you could 3 weeks from now. If you are opposed to any provision of it you can say so.

Mr. TREVOR. I think very often—perhaps it is not proper for me to say so—that very often witnesses come down here and take positions against things that they have not given mature consideration.

The CHAIRMAN. That is to be expected, and that is all right. This is a free country, and there are lots of people that oppose everything. They would oppose the Ten Commandments.

Mr. TREVOR. We don't want to put ourselves in that class.

The CHAIRMAN. I hope you will not. I hope you will be on a higher level.

Mr. TREVOR. We appreciate the high patriotic motive in submitting your amendment originally in its present form. We differ with you on certain points, but I think time for constructive study would result in our being able to present something as representing the patriotic groups in this country that would be something more than a snap-shot opinion which I might render here today.

The CHAIRMAN. It is perfectly clear to me that these various organizations—no doubt all of them—have a very honorable motive in mind, and probably a large majority of them have never thought of such

an amendment as this proposes; that may be true. They are organized on some other basis.

Mr. TREVOR. They certainly began thinking about it yesterday when they learned about it.

The CHAIRMAN. If we are going to do anything, we will never reach the time when all people will be informed and when we will find ourselves confronted with the fact that everybody knows all about it. That will always be an objection. We do not want any more delay on this than is absolutely necessary.

Senator AUSTIN. Senator Norris, let me suggest that this organization of societies, called the Coalition, is made up, as I am informed, and have learned from sitting on subcommittees before which their witnesses have appeared, notably the Immigration Committee—it is made up and represents all classes of political opinion, and they have facilities for employing research experts.

Senator NORRIS. Understand, Senator, I am not saying a word in depreciation of this organization.

Senator AUSTIN. I think they could help us a lot. Personally, I hope this request will be granted, because I think they will furnish us with a lot of valuable information.

Senator NORRIS. I have no doubt they could help us, but if it is going to take us several years to do it, we will be dead before we get around to it. Couldn't you be ready in 2 weeks to go ahead with this?

Mr. TREVOR. You can rest assured, Senator, I am going to make every effort, but you realize that if I am going to do this thing properly, I have got to get some younger men to come in and do some digging on this thing. You, as a lawyer and distinguished member of the bar, realize a thing of this kind represents preparation, like a serious case. I wish to do my utmost to complete our research at the earliest possible moment, but I feel that 3 weeks would not be an unreasonable time for such a job. You see, the date of this resolution is last year, but the publicity that the press gave it was only about a week ago. I know that the delegates who were present at our meeting yesterday were not aware this matter was pending. We ought to live for 3 weeks from today, Senator.

The CHAIRMAN. I am one member of the committee—and Senator Austin is another member and has the same authority I have in the matter; the other members of the committee are not here, and I know why. They have got very good excuses for not being here, and that only illustrates the position the Senators are in. And 3 weeks from now it will be the same thing, so far as the Senators are concerned.

Senator AUSTIN. May I call the witness' attention to something at this time?

The CHAIRMAN. I have been authorized by two absent members of the subcommittee to count them as quorum and vote them, but I will not exercise that power, even if there is no objection to my exercising it. I don't want to be arbitrary about it.

Now, Senator Austin.

Senator AUSTIN. I want the witness to know that this subject has been under consideration repeatedly from time to time, and during the last 27 years; that is, from 1911 to 1928, 18 amendments were offered to change this article 5 of the Constitution, and right now, in this session of Congress, there are five such amendments. They have been in the hopper, you might say, for a long time.

On January 6, 1937, there was one introduced by Mr. Pope, S. J. Res. 22; on January 6, 1937, introduced by Mr. Lonergan, S. J. Res. 26; and over in the House, on April 20, 1937, by Mr. Thomas of Texas; H. J. Res. 327; and January 28, 1937, by Mr. Barry, H. J. Res. 166.

The subject has been discussed publicly by such philosophers as Nicholas Murray Butler, and David Lawrence. Such men have been discussing this bill for a long time. There is a great deal of bibliography on the subject. There was a debate before the people at the time of the ratification of the repeal of the eighteenth amendment, led principally for former Property Custodian Palmer and James M. Beck, a very distinguished constitutional lawyer. Others picked it up and there is an immense amount of material dealing with the subject of this amendment. I should think that with good, energetic, expert help 2 weeks would enable you to get in a position to present your views here.

Mr. TREVOR. If the committee desires to allow us but 2 weeks, naturally we will do the best we can.

Senator AUSTIN. You could use a year, you know.

The CHAIRMAN. Oh, yes; it is almost unlimited.

Senator AUSTIN. A person could use a long time on this subject, because it is a very broad subject, and has a great history, but for the presentation of your case, certainly enough support for your claims, I think 2 weeks, with energetic work, should satisfy you.

Mr. TREVOR. Then, Senator, if you will allow us 2 weeks we will do the best we can.

The CHAIRMAN. I have some documents, and probably the Senator has also, that I wish to put in the record today. Suppose we have it understood, then, that when we adjourn this committee today, it will adjourn for 2 weeks from today at 10:30 in this room.

Mr. TREVOR. Senator, will you permit the names of these people who desire their names appended to the telegram to be added to the record?

The CHAIRMAN. The only objection I have to that is that we are going to have a big record here, and for the benefit of those who will have to examine the record, I am trying to keep it as concise as possible.

Mr. TREVOR. I merely wanted to indicate that I am not expressing merely my own opinion.

The CHAIRMAN. Oh, we understand that.

Senator AUSTIN. We sometimes file such things.

Mr. TREVOR. I merely wanted to indicate I was not appearing here as an individual.

The CHAIRMAN. I am not criticising your appearance here. That is all right. I don't want you to imply that anything I said meant anything of the kind. I want the fullest discussion, but still I want to confine it to the subject matter, so that the record will not be too voluminous.

Mr. TREVOR. I appreciate that, and I want to thank the committee for its courtesy in extending 2 weeks to us for a study of the matter.

The CHAIRMAN. Is there anyone else who desires to be heard?

If not, Senator, what have you to present?

Senator AUSTIN. I don't know whether the chairman has seen this supplemental statement by James Emery Brooks, who testified here the other day or not. Apparently he wishes to supplement what he said before by a two-page statement.

The CHAIRMAN. All right, we will just let it go in the record, Senator.

SUPPLEMENTING STATEMENT, BY JAMES EMERY BROOKS, WHO TESTIFIED AT THE HEARING BEFORE A SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE JANUARY 18, 1938

The following amendments to the joint resolution (as submitted and printed) are offered for consideration by the subcommittee:

1. Article V of the Constitution to remain as it is.

2. Substitute for the rest of the joint resolution, the following:

"Amendments to this Constitution not ratified by three-fourths of the States within 4 years after being submitted to the States by the Congress, shall fail by limitation." (Or words to that effect.)

The effect of this substitute amendment would be:

1. Should the Congress elect to have ratification of any submitted amendment by conventions, the process would follow that used to ratify the twenty-first amendment (repeal). This method could be used when speedy action is desired. It would be the desirable method when the will of the people is generally known, and there is a desire on their part to participate.

2. Should the Congress elect to have ratification by State legislatures, the States will have a period of 4 years within which to act.

In all probability a good amendment would be ratified within 2 years.

It should be provided in the amendment itself, or by statute, that ratifications only are to be certified to the Secretary of State, and that such ratifications are final.

The only provision for rejection would be in the time limitation of 4 years.

During the 4 years provided for consideration of a submitted amendment, the States could follow one of several methods, of their own choice.

(a) The State legislatures might hold public hearings to learn the will of the people (as has been done in many States).

(b) The State legislatures might call for a referendum vote, not binding on the legislature, but, to get an expression of the will of the voters (as has been done in Massachusetts).

(c) A State might postpone action until a legislature had been elected subsequent to the submission of the proposed amendment (Florida).

(d) In any State, the failure of the legislature to ratify in any one year, would not bar consideration and ratification by the same or a newly elected legislature in any subsequent year within the time limit.

3. If at any time within the 4-year period the Secretary of State shall have received certificates of ratification from three-fourths of the States, he shall proclaim the amendment adopted; otherwise it shall become void at the end of the period.

With knowledge of the time limit both the legislatures and the people of the States will be inclined to take speedy action.

The proponents of an amendment would have ample time in which to carry on State campaigns in favor of ratification.

Past experience leads to the belief that a good amendment has very little chance of rejection by this method, while on the other hand, an amendment with such potential dangers as the so-called child-labor amendment could be disposed of and the way made clear for another amendment, or legislation without the objectionable features.

Respectfully submitted.

JAMES EMERY BROOKS.

Senator AUSTIN. I followed the suggestion of the chairman and wrote to Nicholas Murray Butler, assuring him that the committee would be glad to have him appear here, if he wished, to give us the benefit of his special study of this matter, knowing he had made a study of it, and he wrote me a letter on January 19, which contains so much material that I suggest that the letter go into the record as a sort of introductory to that part of his speech, entitled "Some Problems of Our Government," an address at the Parish House Art Museum, Southampton, Long Island, September 6, 1936.

I do not care to have the record expanded to cover his whole address, but only that part which is relevant to this inquiry.

The CHAIRMAN. If you care to mark it.

Senator AUSTIN. I will mark it.

The CHAIRMAN. Well, let the letter go in, followed by such part of the speech as Senator Austin indicates by his marking.

(The letter and abstract from the speech in question, are as follows:)

NEW YORK CITY, *January 19, 1938.*

Hon. WARREN R. AUSTIN,
United States Senate, Washington, D. C.

MY DEAR SENATOR AUSTIN: I thank you for writing me under date of January 18 concerning Senate Joint Resolution 134, which proposes an amendment to the Constitution of the United States relative to the method of ratifying constitutional amendments by popular vote.

I deeply regret that I cannot be in Washington on January 26 to appear in person before your committee, but am happy to take this opportunity once again to express my views on this vitally important subject. I enclose herewith a copy of an address delivered by me at Southampton, Long Island, on September 6, 1936, entitled, "Some Problems for Our Government," in which this question is discussed specifically and at length beginning on page 3. I am glad to submit this statement to you for such use as you may care to make of it, whether by putting it before your committee or by printing it in the Congressional Record or otherwise.

I can only repeat what I say emphatically in that statement, that in my judgment it is of highest importance that this matter should be dealt with now, when there is no amendment pending to which it could relate, and before action is asked upon other amendments which it seems quite certain will be proposed from time to time in the near future.

The views which I expressed in my Southampton speech are contained in substance in the bill H. R. 299, introduced into the House of Representatives on January 5, 1937, by Congressman Wadsworth, of New York. I also enclose a copy of that bill.

Senate Joint Resolution 134, introduced by Mr. Norris on April 19 last, does not adequately meet the situation or solve the problem which confronts our people. It completely overlooks the absolute necessity of providing in the Constitution for the defeat of an amendment as well as for its ratification. It is the lack of this provision in our Constitution which has made most of our trouble and might have made much more. It was not until 1920 that the United States Supreme Court incidentally remarked that amendments submitted for ratification in 1789, in 1810, and in 1861 could no longer be regarded as pending. That is, they had been defeated by the passage of time; but of how much time?

In my judgment, it is imperative to provide, as is done in the bill H. R. 299 to which I have referred, that an amendment hereafter proposed to the Constitution shall be deemed to have been ratified as a part of the Constitution when it has been ratified by three-fourths of the States within 5 years after the amendment has been proposed and not later; or shall be deemed to have been rejected and no longer capable of being ratified by any State when it has been rejected by more than one-fourth of the States.

If, as Senator Norris proposes, the three-fourths and one-fourth in the foregoing statement are to be displaced by two-thirds and one-third, the principle there stated would hold nevertheless.

It seems to me distinctly unfortunate to eliminate the possibility of ratification by State legislatures, provided the legislature acting upon an amendment has been chosen by the people after the amendment had been submitted to the States by the Congress. I see no objection to substituting ratification or rejection by vote of the people for that by a convention chosen by the people, for the reason that such conventions must, like the electoral college, become simply a method of recording the people's action and of forwarding a record thereof to the Secretary of State at Washington.

My reason for wishing to keep, as an alternative method of ratification, action by the State legislatures is that we are in great danger of undermining our republican form of government without realizing it. Direct democracy very rarely works successfully, and then only over a limited area and for a limited population. It worked pretty well in ancient Athens for more than a hundred years, but it has never worked well anywhere else. It was realization of this fact which brought the republican form of government into existence. The republican form of government is, of course, democracy working through chosen representatives. It would be fatal to many of the principles and customs which we so greatly care for if we were now to turn our back upon representative democracy, or republicanism, and make direct democracy our only method of political action.

In my judgment, the essential matters are: (1) Provision for ratification or rejection within a reasonably short time, say 5 years, after submission; (2) provision for definite rejection as well as for definite ratification; and (3) provision for the alternative method of ratification by (a) State legislatures chosen after submission of the amendment, or (b) direct vote of the people.

Please read carefully and have your committee consider the unanimous opinion of the Court of Appeals of Kentucky in *Wise and Moss* v. *Chandler et al.*, decided October 1, 1937.

I earnestly hope that the Congress will deal with this matter at its present session, for no one can tell how soon the people of the United States may be called upon to pass on new proposals to amend the Federal Constitution. If I can render any additional service in connection with this vitally important question, please do not hesitate to command me. I greatly regret that a trip to Washington just now is impossible.

With cordial regard, I am

Faithfully yours,

NICHOLAS MURRAY BUTLER.

AMENDING THE CONSTITUTION OF THE UNITED STATES

The discussion now going on relative to the so-called child-labor amendment—which should be called the youth-control amendment—to the Constitution of the United States, indicates an embarrassment, and indeed a danger, which may confront the American people at any time. During the first century of the Nation's existence nearly 2,000 amendments to the Constitution were proposed at one time or another, many of them quite absurd and wholly revolutionary in character. During the last half century many hundred additional proposals for constitutional amendment have been offered to the Congress, and it is plain that still other proposals for amendment will be urgently pressed in the near future. Under these circumstances and without any regard whatsoever to the character of the amendments themselves, it is of vital importance that the procedure to be followed in amending the Constitution be definitely and reasonable determined in order that the public mind may be free to deal with the character and content of the proposed amendments themselves and not diverted to a long and angry discussion as to the process of amendment.

Up to the present time the Congress has neglected to discharge its proper responsibility in respect to this subject and the time has come when public opinion should require the Congress to act without further delay. Few Americans realize that the first two amendments proposed to the Constitution of the United States were submitted for ratification in 1789 and that no report upon them has yet been had. The same is true of an amendment submitted in 1810, as well as of the vitally important amendment submitted in 1861 and supported by President Lincoln in his first inaugural address, by the terms of which the abolition of slavery in the United States would have been made impossible save with the consent of the States themselves. Since these four amendments were neither ratified nor rejected, are they still pending? If not, why not? If so, how many votes would be required for their ratification? Would that number be three-fourths of the number of States which comprised the Union at the time when these amendments were severally submitted, or would it be three-fourths of the 48 States now existing? Merely to ask these questions is to show the absurdity of the situation. Fortunately, the United States Supreme Court, speaking by Mr. Justice Van Devanter, said in 1920 that the view that "four amendments proposed long ago—two in 1789, one in 1810, and one in 1861 —are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be supplemented in enough more States to make three-fourths by representatives of the present or some future generation," is quite untenable. The Court concluded that the ratification of an amendment must be within some reasonable time after its submission (256 United States Reports, 1920, *Dillon* v. *Gloss*, p. 375). At the same time the Court held that it was within the power of the Congress, keeping within reasonable limits, to fix a definite period for ratification of an amendment. It was held that 7 years, the period fixed for the ratification of the eighteenth amendment, was reasonable. Beyond that the Court has not gone.

The history of the wrongly named child-labor amendment illustrates admirably the embarrassments and the dangers of a lack of a proper system of administrative procedure in respect to ratification. Surely it is reasonable to hold that when the Secretary of State announces the submission to the States of a proposal to amend

the Constitution of the United States, he is in effect calling the roll of the States. Surely he should make public announcement, if and when 36 affirmative votes have been recorded, that the amendment is ratified, and surely he should make announcement, if and when 13 negative votes have been recorded, that the amendment is rejected. During the roll call, in accordance with established parliamentary law, a State might be at liberty to change its vote, but after 36 affirmative votes have been recorded, or after 13 negative votes have been recorded, the effect of the roll call is complete and the result should be announced accordingly. The preposterous notion which grew up out of the partisan necessities of the reconstruction period that a State may change its vote from "no" to "yes," but may not change it from "yes" to "no," is quite too absurd for discussion. It was Secretary Seward who declared that the fourteenth amendment had been ratified by the States of New Jersey and Ohio, although at the same time he recorded the fact that both States had withdrawn their ratification. He also counted Georgia, North Carolina, South Carolina, and Virginia as ratifying the amendment, although he records the fact that they had originally rejected it. In other words he assumed, without any warrant either in law or in logic, that in voting upon a constitutional amendment a State may change its vote from "no" to "yes," but may not change its vote from "yes" to "no." The inference would be that any pending amendment must sooner or later be ratified or left hanging in the air. It is under no circumstances to be defeated. This is, of course, a grotesque conclusion.

The history of the miscalled child-labor amendment proves this to the full. Between July 1924 and March 1927 this amendment was rejected by both houses of the legislatures of 26 States and thereby decisively defeated. At one time or another all but six of the States have, either by one or both houses of their legislatures, voted not to ratify this amendment. Why was not this fact publicly announced and recorded, and how does it come to be possible 10 years afterward to put pressure upon State legislatures to ratify a proposal which the States have long since conclusively rejected? It can only be repeated that this is made possible by the chaotic condition in which legislation, or lack of legislation, relative to the ratification of constitutional amendments has left the whole matter.

It is imperative that legislation be adopted without delay, at a time when the matter can be considered on its merits and without references to any pending proposal for constitutional amendment to regulate with definiteness the procedure to be followed when a proposal to amend the Constitution is submitted to the States. Such legislation might well take the form contained in the bill introduced by Representative Wadsworth of New York on January 3, 1935, known as H. R. 2900, Seventy-fourth Congress, first session, By the provisions of this bill, every amendment hereafter proposed to the Constitution of the United States would be submitted for ratification by conventions in the several States, unless specifically provided otherwise in the resolution of proposal. This would insure giving public opinion in the several States an opportunity for expression in regard to any pending proposal for amendment in a way that could not be misunderstood or misinterpreted.

The conventions called to consider the ratification of a proposed amendment should be composed of delegates elected at large by the people of the several States. They should be chosen at a general election in order to reduce the cost to a minimum. These delegates, meeting in convention, would act as members of the electoral college now act, to record formally, without debate and without delay, the action of the State in regard to the pending amendment as expressed by the voters themselves.

It should also be provided definitely that any amendment hereafter proposed shall be deemed to have been ratified as part of the Constitution when it has been ratified by three-fourths of the States, or shall be deemed to have been rejected and no longer capable of being ratified by any States, when it has been rejected by more than one-fourth of the States. No State which has ratified or rejected a proposed amendment should have the power to change its vote.

The enactment of such a statute, short, simple and easily understood, would substitute order for chaos in the process of acting upon a pending constitutional amendment. It is of pressing importance that such action be taken before public opinion becomes alarmed and excited over some new proposal to amend the Constitution. The Supreme Court has made it pretty plain that the entire procedure to be followed in amending the Constitution of the United States is under Federal control and that provisions of State constitutions and statutes cannot prevail as against Federal regulation.

Senator AUSTIN. I think it is well to note that in the course of his address, Mr. Butler makes certain statements that press the urgency of this kind of legislation, in one of which he says:

It is imperative that legislation be adopted without delay at a time when the matter can be considered on its merits and without reference to any pending proposal for constitutional amendment, to regulate with definiteness the procedure to be followed when a proposal to amend the constitution is to be submitted to the States.

And at a later point he makes this rather sweeping statement:

It is of pressing importance that such action be taken before public opinion becomes alarmed or excited over some new proposal to amend the Constitution. The Supreme Court has made it pretty plain that the entire procedure to be followed in amending the Constitution of the United States is under Federal control, and that provisions of State constitutions and statutes cannot prevail as against Federal regulation.

Then I would like to include the concluding part of his speech, beginning at page 20, to the end, as follows:

Here, then, are six matters affecting the operation of our Government which make no partisan or personal or group or sectional appeal, They stand in no relation to the principles or the doctrines of any political party, whether Democrat or Republican or Socialist. They concern directly every citizen of the United States. Why, therefore, can these six problems not be quickly and constructively solved? To the cynic and the pessimist their solution would appear to be what such a one calls "a very large order," but what he really means is that pressing for the solution of any or all of these problems there is no party or personal or group or sectional interest. Must the American people face an assertion of that sort with placid contentment? Why have they not the power to compel action purely in the public interest?

This generation should read the text of the noteworthy speech made in the United States Senate on March 27, 1890, by Senator Edmunds of Vermont when the Sherman Antitrust Act was under debate. "The citizens of the State of Vermont," said Senator Edmunds, "are no more my constituents than the citizens of the State of California, for a Senator of the United States, although elected by the legislature of the State from which he comes, becomes a Senator of the United States, and every human being within the broad boundaries of the Republic, from the shore of the stormy sea on the east to the tranquil one on the west, is my constituent." Let that principle and viewpoint prevail and the Congress of the United States will proceed to enact legislation in the public interest without awaiting the appearance or feeling the pressure of any organized partisan, personal, or group interest.

What we have most to fear in ordering and carrying forward the social, the economic, and the political life of the world in these desperately difficult days was stated in unforgettable words by General Smuts in his rectoral address at the University of St. Andrews on October 17, 1934: "The disappearance of the sturdy, independent-minded, freedom-loving individual, and his replacement by a servile, standardized mass-mentality is the greatest human menace of our times." These are profoundly true words. Mass-mentality, with its waves of unreasoning emotion and its quick turning hither and yon in pursuit of an end which it neither sees nor understands, is one of the greastet forces now at work for weakening the basis on which our civilization rests. If we can call our fellow-citizens up to the heights of independent-minded, freedom-loving individualism, we shall be on the way to the creation of a truly corporate state, because it will be composed of cooperating individuals who are free to know, to understand and to express themselves concerning everything which comes into their lives.

Once again it must be repeated that the surest way in which to build a barrier against the rising tide of compulsion, whether it takes the form of communism, of fascism, or of dictatorship, is to make free government really work on the highest possible plane of effectiveness and solely in the largest public interest.

Senator AUSTIN. I believe there should be available, Mr. Chairman, in our record, reference to these two cases, so that the Senators may refer to them.

The CHAIRMAN. I believe they should not be printed, but reference made to them, so any student can look it up.

Senator AUSTIN. That Kansas case is *Coleman* v. *Miller*, 146 Kansas Advance Sheets, 390. That is the number dated November 25, 1937; the Kentucky case is *Wise et al.* v. *Chandler et al*, 270 Kentucky Advance Sheets, page 1. These are the advance sheets of October 1937.

I have some other material which I will have to sort before it can be included in the record. It would be too voluminous to go in as it is. Some of it favors the resolution and some is opposed to it.

Senator NORRIS. I have an argument here presented by the Committee for Republican Integrity. Its office is at 2211 Broadway, New York City. Charles S. Leeds is its chairman, and Lambert Fairchild, its secretary. They have presented an argument against the resolution, which we will print at this point in the record.

(The letter is as follows:)

COMMITTEE FOR REPUBLICAN INTEGRITY,
2211 Broadway, New York.

The SENATE JUDICIARY COMMITTEE,
Washington, D. C

GENTLEMEN: As Republicans without any capital, and that goes two ways if you know what we mean, we protest any modification in the method of amending the Constitution which will make that instrument more responsive to sudden waves of popular sentiment, to mob reactions, if you will. We submit that the proposals in Senate Resolution No. 134 are democratic in aim. That is exactly what is wrong with them, they are too democratic for a country that is getting altogether too much democracy for the good of a republic.

Beginning with primary elections and the direct election of United States Senators we have rapidly drifted toward the shoals of that literal democracy which always leads directly through to absolutism, autocracy, or whatever you wish to call it. The old Greeks hd a word for it, "tyranny," and called the heads of government "tyrants." We are getting a taste of it now, and it doesn't taste so good.

It's a great word to ballyhoo with, "democracy." Republicans and Democrats alike conjure with the magic word. It's a great shibboleth, too. Socialism has sneaked into the Democratic Party and the Republican Party as well, using "democracy" as the password; and pretty well intrenched in both parties, the radicals are foisting their doctrines upon a well-doped public. As active members of the Republican Party, we hold these radicals responsible for the nomination of a Landon for president and the selection of a Glenn Frank as a party program manager. They have no trouble with the "h" in shibboleth nor with the "mock" in democracy. Between Landon and Roosevelt, we certainly got plenty of "democracy" in the last national campaign.

It is easy enough to alter our Constitution right now. Amendments which appeal to the best brains of the country don't take too long to pass, and we earnestly request that you report unfavorably upon this latest assault upon our Republic despite all the scheming and plotting of those who would eventually force a literal democracy upon this great representative Government.

In closing, we direct your attention to the fact that the President of the United States vigorously opposed the notorious Ludlow resolution providing for plebiscites upon war, upon the same republican grounds upon which we oppose this Norris resolution.

COMMITTEE FOR REPUBLICAN INTEGRITY,
C. S. LEEDS, *Chairman.*
LAMBERT FAIRCHILD, *Secretary.*

Senator AUSTIN. Excuse me, Senator; I should have said that the *Kentucky case* was put into the Congressional Record on January 18, at page 968.

Senator NORRIS. There is an argument here from the League for Constitutional Government, 18 East Forty-ninth Street, New York

City, of which John D. Snow seems to be the official, in opposition to the resolution, which will be printed at this point in the record.

(The letter is as follows:)

LEAGUE FOR CONSTITUTIONAL GOVERNMENT,
New York City, January 14, 1938.

Reference: Senate Joint Resolution No. 134.

SENATE JUDICIARY COMMITTEE,
United States Senate, Washington, D. C.

GENTLEMEN: The President of the United States in his recent message regarding the Ludlow amendment emphasized that this country is a republic based upon the representative system rather than a democracy.

In view of the fact that Senator Norris' resolution is intended to weaken the safeguards against hasty and unwise amendments to the United States Constitution and carries with it a further attempt to destroy the Republic, it is inconceivable to us that the Senate Judiciary Committee would act favorably on such a proposal.

There has been a very definite attack against our Republic for many years which we have so clearly explained in our leaflet entitled "Democracy a Misnomer," copy enclosed. Senate Joint Resolution No. 134 is without a doubt a furtherance of the program to bring us more rapidly into a pure democracy.

A further report on Senate Joint Resolution No. 134 would be a direct attack against our form of government, and we sincerely hope that your committee will fully realize the portent of such a resolution and will do its utmost to see that it is reported unfavorably.

Yours very truly,

JOHN B. SNOW,
League for Constitutional Government.

Senator NORRIS. Here are some suggestions for amendment by Abraham C. Weinfeld, 4831 Thirty-sixth Street NW., Washington, D. C., which will be printed:

(The letter is as follows:)

WASHINGTON, D. C., *January 16, 1938.*

Hon. GEORGE W. NORRIS,
United States Senate, Washington, D. C.

DEAR SENATOR: From a study of Senate Joint Resolution No. 134, introduced by you on April 19, 1937, I have gained the impression that section 3 thereof, which gives the States exclusive power to submit proposed amendments to the electorate, was drafted on the assumption that under the present wording of article 5 of the Federal Constitution the States have exclusive power to call ratifying conventions. Your provision seems to have been thought to be parallel to the present law.

In this connection I take the liberty to call your attention to my article published in this month's Harvard Law Review, entitled "Power of Congress over State Ratifying Conventions," in which the available evidence has been considered and the conclusion has been reached that Congress has power to call ratifying conventions in the States if it chooses to do so.

If my conclusion is correct, Senate Joint Resolution No. 134 would be giving up an important power now vested in Congress, to submit a proposed amendment to the people of the United States without being at the mercy of the State legislatures. It seems to me that that power should be retained by Congress, and with that in mind I take the liberty to suggest that section 3 be amended in part, to read as follows:

"SEC. 3. The Congress shall have power to submit proposed amendments to popular vote in each State or by a uniform law to regulate such submission by each State. Unless otherwise provided by Congress, each amendment shall be submitted by each State to the electors thereof at the next general election held therein after the date the amendment is proposed; except that if a general election is to be held in any State within 60 days after the date an amendment is proposed the amendment shall be submitted to the electors in such State at the next succeeding general election. The electors in each State shall have the qualifications requisite for electors of the State legislature. If a majority of the votes cast in any State on an amendment is cast for the amendment such State shall be deemed to have ratified the amendment."

You will notice the addition that precedes the present wording of section 3. Two sentences in present section 3, beginning with "Each State", in line 15 and ending with "several States", in line 21, have been omitted. The last sentence is slightly changed.

Respectfully yours,

ABRAHAM C. WEINFELD.

Senator NORRIS. I have an article which I have not had time to read, since I received it only this morning, from the League of Women Voters, which is a national organization with a very fine reputation. I will put in the record the letter of transmittal, and the argument they make. I judge from the letter of transmittal, it is favorable to the enactment of the legislation.

(The letter is as follows:)

NATIONAL LEAGUE OF WOMEN VOTERS,
Washington, D. C., January 25, 1938.

Hon. GEORGE W. NORRIS,
United States Senate, Washington, D. C.

MY DEAR SENATOR NORRIS: I have the honor to transmit to you a statement giving the views of the National League of Women Voters upon the subject of your resolution, Senate Joint Resolution 134. May I request you to file it with the subcommittee of the Senate Judiciary Committee, of which you are chairman? This proposal for a constitutional amendment changing the amending process is of particular interest to the League of Women Voters at the present time in view of our recent decision to the effect that the method of securing amendments to the Constitution should be less difficult and more responsive to the will of the electorate.

Very truly yours,

MARGUERITE M. WELLS, *President.*

STATEMENT OF MARGUERITE M. WELLS, PRESIDENT, NATIONAL LEAGUE OF WOMEN VOTERS

Miss WELLS. The League of Women Voters is concerned about the method of securing amendments to the Federal Constitution and is of the opinion that the process should be "less difficult and more responsive to the will of the electorate." This conclusion is based on first-hand experience with the amending process over a period of years. Twelve years ago the league worked actively in opposition to the proposed Wadsworth-Garrett amendment which would have made the amending process more difficult. Over a period of 13 years efforts have been exerted in behalf of ratification of the child-labor amendment; there was work over a 5-year period both to secure submission to the States and ratification by the States of the so-called lame duck amendment; and at the present time there is interest in the matter of securing submission to the States of an amendment providing for Federal suffrage for the District of Columbia. No conclusion has yet been reached in regard to the precise changes in the provisions for the adoption of constitutional amendments which the League of Women Voters would be willing to support, but the various possibilities for change are being studied carefully and we wish to comment on the pending proposal, Senate Joint Resolution 134.

The fact that a very small minority of the people, through action taken in the 13 smallest States, can block ratification of an amendment desired by the large majority of the electorate makes it highly desirable that the proposal contained in the Norris resolution for a reduction in the number of States required for ratification from three-fourths to two-thirds be considered seriously. Also the fact that defi-

nite ratification or rejection of an amendment may be delayed or entirely blocked at the present time through the failure of State legislatures to act or provide for action by conventions, makes suggestions, such as the one contained in Senate Joint Resolution 134, for the consideration of proposed amendments by all the States at a specified time and a time reasonably soon after action by the Congress particularly pertinent. Another possible means of facilitating the ratification process, in the event of ratification by State legislatures, might be action by joint sessions of both houses. In considering proposals for changes in the amending process, it might also be well to direct attention to the process of submission of amendments to the States. It should be borne in mind that in contrast to adoption of 21 of the 26 amendments proposed to the States in the course of the country's history, some 3,800 resolutions pertaining to constitutional amendments—not all different proposals, to be sure—have been introduced into Congress of which only 26 have mustered the requisite two-thirds majority in each House. This would seem to indicate that the method by which amendments are submitted to the States as well as the means by which they are ratified should be considered by any group discussing possible changes in article V of the Constitution.

At the present time, however, we wish to comment in particular on the proposal contained in Senate Joint Resolution 134 for a popular referendum on constitutional amendments. In our opinion, efforts to answer problems posed by the ineffective working of our machinery of government by increasing the amount of direct participation of the electorate call for careful scrutiny. In the first place, it should be pointed out that the hope of making the amending process less difficult through the direct submission to the voters of proposals for change rests on the assumption that the forces tending to delay or block action by representative bodies will not be operative if the electorate as a whole is involved. The validity of this assumption may be fairly questioned. If it is claimed that legislatures or conventions, as the case may be, in considering amendments to the Federal Constitution, are subject to misinformation or are influenced by groups with an economic interest at stake, can it be said that the electorate as a whole is any less influenced by propaganda? It may be claimed that elected representatives are not always guided by the public interest in considering proposed amendments. But one may perhaps overcome this difficulty by further democratizing the process of ratification, only to be confronted with an equally serious difficulty in the indifference of large groups of voters.

It is well known that only a portion of the electorate concern themselves closely with public affairs, that this portion tends to decrease with the increase in the number of decisions referred to them, and that participation in referenda is almost always smaller than participation in other types of elections. Since this is so, the forces that determine the result in a popular referendum may be as capricious as those operating on a representative body. It may be questioned whether any more adequate expression of the "popular will" would be secured through a popular vote than through the vote of a regularly constituted representative body.

Furthermore, although some proposals for constitutional amendments can be decided effectively by the electorate as a whole by means of a simple "yes" and "no" vote—e. g., the amendment providing for

the repeal of the prohibition amendment—many proposals involving complex issues can be given fair treatment if only voted upon by a body that has had the opportunity of full discussion and deliberation. Although considered debate usually takes place in Congress over a period of time before submission of an amendment to the States, this does not carry over to the people sufficiently to serve as a substitute for deliberation on the part of those called upon to ratify. Proposals to submit questions, other than the simplest type, to the people for decision is in direct contravention to the theory of representative government. Counting noses as a means of reaching mature decisions in the field of government, regardless of the basis of judgment on the part of those voting and regardless of the extent of participation by those eligible, leaves much wanting as a means of increasing the effectiveness of the amending process as a tool of government.

Senator NORRIS. I have also a letter from Professor Aylsworth, professor of political science at the University of Nebraska, in which he makes an argument on the question. This will appear in the record.

(The letter is as follows:)

THE UNIVERSITY OF NEBRASKA,
Lincoln, January 24, 1938.

Hon. GEORGE W. NORRIS,
United States Senate, Washington, D. C.

DEAR SENATOR: I am much interested in your proposed amendment to the present method of amending our National Constitution. Therefore, I am prompted to write you giving some of my ideas and suggestions.

Of course, there are two great steps in securing an amendment: First the proposal, or submission of it, and second, the ratification by the States. In the past the main difficulty has been with proposal and not ratification. Of the first 12 amendments proposed, 10 were quite promptly ratified. Of the 14 amendments submitted to the States since, all but 3 have been ratified. Thus, of a total of 26 amendments proposed 21, all but 5, have been adopted. For about 60 years before the Civil War and about 45 years after it, not a single amendment succeeded in running the gauntlet of Congress. The amendment providing for the direct election of Senators (the seventeenth) passed the House by the required two-thirds vote several times before even getting out of committee in the Senate. On the other hand, your "lame duck" amendment passed the Senate some four or five times by an overwhelming vote (nearly unanimous) before getting out of committee in the House. In each case proposal was held back long after the public mind had been made up and was waiting impatiently for the question! Hence the rapid and overwhelming ratification by the States when finally submitted.

But despite all this, your proposed amendment leaves the method of submitting amendments unchanged. It will still remain possible for one more than one-third of either House (in case of a full attendance, 33 in the Senate or 146 in he House), or if not a full attendance, then only 1 more than one-third of those voting (provided a quorum is present) to prevent an amendment from being sent out to the States.

It seems to me this requirement is based on a wrong conception of the proposing of an amendment. For it is quite different from enacting a law which Congress gives effect to. For Congress cannot give effect to amendment. That can only be done by the States, and now three-fourths of them.

The vital question in submitting an amendment is whether there is a sufficiently strong demand for it to warrant putting the States to the trouble and expense of voting on the question of ratifying it. Why should a two-thirds vote be required for this when only a majority vote was required to declare war on Germany, to take over the railroads, to pass the Lever food-control act, to make kidnaping a capital offense, to enact all the New Deal legislation?

It seems to me that it would be better and perfectly safe to require only a majority vote of all the members elected, that is, 19 in the Senate and 218 in the House, when the membership of each is full.

I would like to see a workable provision for the proposal of amendments by the States, i. e., by a certain number of them, or by States which together had a cer-

tain number of presidential electors. But that is probably impolitic to try for as things now are. Again, I don't think one House should be allowed to balk the submission of an amendment to the same extent that it can the enactment of a law because of the great difference between the two. It seems to me that after either House has voted some three or four times by the required vote and especially by much more than the required vote the amendment ought to go out to the States, even without the approval of the other House. Of course changing the requirement to a majority of all the members elected, instead of a two-third's vote would obviate the need for this.

I heartily approve ratification by popular vote in the States. Sentiment for ratification by conventions rather than legislatures has been growing, and probably is now dominant, as shown by the provision of your proposed amendment. But as shown by our experience with the twenty-first or repealing amendment, such ratification under present political conditions and practices is really indirect ratification by popular vote—after much more expense and trouble and delay. I think a requirement for ratification within a definite number of years may be advisable, say, 10 years, or possibly 8 years. It will take the matter out of Congress and out of the courts. I doubt very much whether rejection at the first election by one-third of the States should kill the amendment, and force a new proposal, or submission.

Such a provision favors the old, favors tradition, ignorance, and lack of understanding, favors the first reaction, born of opposition to change. I think a reasonable time, at least 8 years, should be allowed for education and discussion to break through the armor of conservatism. And not only that, but the fearfully strong and blind-to-public-interest-and-general-welfare opposition of those who are fortified and advantaged by the continuation of the old for which they therefore fight to the last ditch.

But I must close and turn to other things that are pressing. With best wishes, I remain,

Cordially yours,

L. E. AYLSWORTH.

Senator NORRIS. Senator Austin, there is a very illuminating article on the subject in the American Law Review of November 3, 1937, entitled "Power of Congress over State Ratifying Conventions," by Mr. Winfield, on page 473. It is a very long article, and I think reference to it would be sufficient.

Senator AUSTIN. There is also one in 28 Michigan Law Review, at page 568.

Senator NORRIS. An article entitled "Reform of the Federal Amending Power," by Lester B. Orfield, assistant professor of law, University of Nebraska, appears in the Nebraska Law Bulletin, volume 10, commencing at page 350.

I would like at this time, Senator Austin, to say that these reviews are very interesting, but many of them are technical. I have not tried to put the articles themselves into the record, because a student who wants to make a full analysis of the subject can get them without having them printed in full. If we printed them in full it would take up entirely too much space.

Senator AUSTIN. There is another good one in Colorado Law Review; 20 Colorado Law Review, 499.

Senator NORRIS. Then, if there is nothing further, we may just as well adjourn at this point for 2 weeks. I hope we can conclude the hearings when we return. The truth is that we could spend a year on the subject. It would be interesting all the time, but it is out of the question to do such a thing. We will have to exercise our judgment in keeping the record down.

(Whereupon, at 11:30 a. m., the committee adjourned to meet at 10:30 a. m., Wednesday, February 9, 1938.)

RATIFICATION OF CONSTITUTIONAL AMENDMENTS BY POPULAR VOTE

FEBRUARY 9, 1938

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10:30 a. m., in room 357, Senate Office Building, Senator George W. Norris (chairman), presiding.

Present: Senators Norris (chairman), Hatch, and Austin.

STATEMENT OF HON. BAINBRIDGE COLBY, NEW YORK CITY

Senator NORRIS. Mr. Colby, the committee will be very glad to hear you now if you wish to proceed.

Mr. COLBY. I do.

Senator NORRIS. Of course we know who you are, but for the record you might state your name and your business.

Mr. COLBY. My name is Bainbridge Colby, of New York, a lawyer, and one of the vice presidents of the American Coalition, for whom I am speaking this morning.

Shall I proceed with the subject, now, Senator?

Senator NORRIS. Yes, Mr. Colby.

Mr. COLBY. I am not here to make what is ordinarily described as an argument. I have rather some reflections to submit, Senator, believing them worthy of your consideration, and of importance. I think I can best indicate the tone I should like to maintain in discussing this question by reading from the remarks of Senator Norris himself, printed in the sixty-fifth volume of the Congressional Record on page 4941. Senator Norris was speaking in 1924 on this subject and, if he will permit me, I will recall his words to him [reading]:

> Some people want to make it more difficult to amend the Constitution. Others want to simplify it. There is argument on both sides. I can see absolutely that there is a good argument each way, but I cannot conceive of any argument that simply calls for delay.

With your permission, I shall discuss that question of delay, a little later, but I think that by recalling these words we come to the frame of mind which should mark this discussion. I think that is a pretty fair approach, that there is a good argument each way. My argument will be in the nature of opposition, but more truly in the nature of caution, of warning. My feeling is that the subject is one that should be approached with detachment, in a thoroughly sober and judicial spirit.

Some treatises on constitutional law dispose of the Federal amending power in few words. Even the Federalist has little more to say beyond remarking that—

> It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.

Later authorities have stressed the division of authority between the Federal Government and the States, the doctrine of judicial review, the supremacy of the Constitution, the bill of rights, the taxation and commerce clauses, and the due-process clause, in the fourteenth amendment. But they have paid less attention to the amending sections, although Professor Orfield, whom you no doubt know, Senator Norris, of the University of Nebraska, has pointed out, the subjects mentioned deal only with the existing distribution of powers, while the amending power may bring about a complete alteration of the Constitution.

It is thus obvious that, in dealing with the amending power, we are dealing with a power of higher grade and of more potential importance than any other power provided for in the Constitution.

This was the view of the late John W. Burgess, who, in his monumental work on comparative constitutional law, treats the amending power as the first, in point of scope, comprehensiveness and vital relation to the Constitution as a whole. To quote Mr. Burgess' words [reading]:

> This is the most important part of the Constitution. Upon its existence and truthfulness depends the question as to whether the States shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression, and revolution.

Of course, I need not dwell upon the duty that has always been perceived and in the main observed, of approaching any question of constitutional alteration, in the most cautious and sober frame of mind. We all recognize that it was not possible to foresee or guard against all the exigencies which may at different times require different allocations of power. While on the one hand a government which is forever changed and changeable is in a state bordering on anarchy and confusion, on the other hand a government which in its organization provides inadequate means of change or which assumes to be fixed and unalterable, must eventually become unsuited to the circumstances of the nation.

I think there is no dispute, as was said by Story, that in every government and, especially in a republic, it is necessary to provide means for improving, if possible, the fabric of the government as time and experience suggest. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation and caution, and to follow experience rather than experiment, suggested by mere speculation or theory.

The founders of our country, and particularly the draftsmen of our Constitution, knew that the besetting weakness of republics is a restlessness and a spirit of discontent at slight evils; that many reckless proposals are advanced under the plea of patriotism or a love of the people which, if embodied in the Constitution, must enfeeble and destroy its value as a safeguard to liberty. It was accordingly proposed and discussed at length in the convention that the power to correct the faults of the Constitution should exist, but that it should

never be prostituted to the service of impatient or designing elements among the people, intolerant of restraint, incapable of taking long or comprehensive views, and intent only upon swiftly achieving the aims which might be momentarily uppermost in their unreflecting and impetuous minds.

Now, I call your attention to this: That until even now only a portion of the resources of the amending power, as defined in article 5, has never been used. Its resources have never been exhausted. By that I mean that the powers already existing and secured under the terms of the amendment article have never been fully used—certainly not exhausted.

Upon the legitimacy and propriety of the power of amendment of our Constitution there can be no difference of opinion. The only question is whether the power is so defined as to accomplish its objects in the safest manner—safest for the stability of the Government and for the rights and liberties of the people.

As I shall point out, all delay and difficulty in the amendment of the Constitution has arisen in the field of the proposal of amendments, and not of their ratification. The adoption of amendments to the Constitution has been characterized by celerity rather than by delay, but what delay has existed in the amendments of the Constitution, as I say, has arisen in the field of the proposal of amendments rather than their ratification. It should also be borne in mind that article 5 of the Constitution, covering the amending power, affirms the express rights in the States, by a vote of two-thirds of their number, to require the calling of a convention for the proposal of an amendment. So satisfied have the people been with the operation of this article that in only a single instance have they, acting through their States, sought, with a considerable accord, to exercise their right to initiate the proposal of an amendment, and this was not pursued. I refer to the seventeenth amendment, when 33 States prior to 1913, petitioned for the calling of a convention, and afterwards 11 of those States withdrew their signatures from the petition, being satisfied with the form of amendment which received the concurrence of both houses of Congress and was afterwards adopted, and this was the amendment providing for the popular election of Senators by the States.

I again repeat that all the delay in the amending of the Constitution has arisen, not in connection with the ratification of an amendment, but in securing the requisite concurrence of the two Houses in the proposal of the amendment. Of the 26 amendments which have gone before the States for their ratification, 21 have been ratified within an average period of 1⅓ years, and, of the 26 submitted, only 5 have failed to secure favorable action on the part of three-fourths of the States.

I make this observation in passing, that the difficulty of securing concurrent action on the part of the two Houses, is about the best evidence, it seems to me, that could be cited of the fact that public opinion was not ready to amend the Constitution, and what the amenders have been really coping with is that hesitation and reluctance in the public mind, which is precisely what the amending clause was intended to reveal so that until public opinion became so concrete, so clarified, so unified, as to secure that degree of concurrence in the proposal of an amendment, the country should be deemed not ready for the amendment.

Let me remind you of this: Up to 1936 more than 3,100 proposals for amendment have been offered in Congress. Some of these were repetitious and some were ill-conceived.

Senator AUSTIN. Will you permit a question at this point?

Mr. COLBY. Certainly.

Senator AUSTIN. Mr. Chairman, may I ask a question?

Senator NORRIS. Yes.

Senator AUSTIN. Are you aware that there are now 44 proposals of amendments pending in this session?

Mr. COLBY. I did not know it was 44. I knew there were 38 in the first session of the present Congress.

As I said, some of these amendments were repetitious, and some were obviously ill-conceived. You may recall that the late Representative from Wisconsin, Mr. Victor Berger, introduced a proposed amendment to abolish the Senate; and, if you will allow me to say so, the idea has already taken form, Senator Norris, in the unicameral legislature of your own State of Nebraska. So I think it was not purely a fantastic suggestion of Mr. Berger. Most of these proposals perished in committees and the rest failed to secure the concurrence of both Houses of the Congress, some passing the House and not the Senate, and some receiving favorable action in the Senate but failing in the House.

The resolution under consideration by this committee is not even aimed at the situation which its sponsors desire to correct, namely, delay in ratification. It proceeds on the assumption that the delay is in the field of ratification. Delay cannot be imputed to the process of ratification, but only to the process of proposal. It is apparent that once a proposed amendment has the required vote of Congress, it has an excellent chance for ratification, inasmuch as 80 percent of the submitted amendments have been duly ratified. It seems to me that is a very good batting average for ratification.

Of course, the amending clause has been the target of innumerable proposals of change, in and out of Congress, almost from the date of its adoption. The first was the proposal of Rhode Island in 1790, for an alteration in the method of amendment by requiring the consent of 11 of the original 13 States. That was proposed in the convention called to ratify the Constitution itself.

The proposal now under consideration by this committee, requiring ratification by only two-thirds of the States, made its first appearance, since the rejection of the idea in the Constitutional Convention, in 1864. It was patterned on a similar provision in the Constitution of the Confederate States.

The proposal that ratification should be by a majority of the electors in the several States first appeared in 1873. Both of these proposals have been renewed, with slight variation, frequently in the last 65 years. It has even been proposed that ratification should be made by a majority of congressional districts and a mere majority of the aggregate vote proposals which are thoroughly out of harmony with the federal principle.

I may observe here that the urge for a direct popular participation in the ratification of amendments has proceeded quite as frequently from a desire to retard as to facilitate their adoption. Thus it was argued with reference to the eighteenth amendment that it was railroaded through the legislature by means of powerful lobbies and

a species of intimidation. Senator Ashurst was quoted in the Congressional Record of September 1919, as avowing his belief in both the eighteenth and nineteenth amendments, but he said [reading]:

> At the same time I am not oblivious to the fact that there are millions of citizens of high character who believe that lobbies intimidated the legislatures of the various States and even intimidated Congress in submitting those amendments.

He was speaking of the prohibition amendment.

Now, the resolution before us is obviously aimed at quickening and easing an amendment of the Constitution. That is its general purpose and object. It is clearly disclosed in its text.

Senator NORRIS. Mr. Colby, may I interrupt you at this point?

Mr. COLBY. Certainly.

Senator NORRIS. The resolution before us does not change in any particular the requirement for the original submission by a two-thirds vote of the Senate and of the House of Representatives.

Mr. COLBY. No.

Senator NORRIS. I think I might be pardoned, being the author of it, by saying that I was influenced to some considerable degree by what I thought, when an amendment was proposed and had the backing of two-thirds of each branch of Congress, was the desirability of having it determined one way or the other, and that within a reasonable time after submission. I thought this amendment would do that.

Mr. COLBY. In other words, not allow it to hang in a state of suspended animation?

Senator NORRIS. Yes. As an illustration, we may take the child-labor amendment. No matter on which side you may be, everybody concedes it is very important. Many years have elapsed since it was submitted. A constant campaign is still continuing to have the States vote on it. Some of the States have acted and then reconsidered and decided the question the other way. Assuming that enough of the States should ratify it, as I see it, the very important question to come before the Supreme Court will be whether the amendment was ratified in accordance with the amending power of article 5. I can see that a very definite question will be before the court as to whether the adoption was not beyond the time.

Mr. COLBY. A reasonable time.

Senator NORRIS. What might be called a reasonable time? The courts might hold, and I think they do so hold—at least, I would not feel like criticizing them—that it was too late. Then the question might easily arise as to whether a State could be on this side today and tomorrow on the other side.

Mr. COLBY. The law is not in a satisfactory condition on that question.

Senator NORRIS. I thought this amendment put it in a satisfactory condition.

Mr. COLBY. As I understand the law, and you will correct me if I am wrong, a State can reject an amendment, but that is not conclusive and final. It can at any time ratify it within that reasonable period, which has never as yet been authoritatively defined. I am inclined to believe that, if that question does come before the Supreme Court, it could very reasonably and justly be held that a reasonable time had expired, and that the failure of the States to ratify it was tantamount to a refusal to do so.

Senator NORRIS. I think everybody will concede that there will come a time when it will be too late. Just what that time is the law does not determine, and the courts will have to pass on that very important question, in all probability.

Mr. COLBY. But with the present unsatisfactory condition of the law, if a State does not exercise its power to ratify or reject, it seems to me there arises another condition which is within the purview of the amending clause. That is, that failure is an indication of reluctance, of refusal to accept the amendment. My point is that all amendments, as to which there has existed that general support which amendments to the Constitution should possess, have been ratified within a reasonable time, and, indeed, with ease and celerity. I think that is at least an exhibit that may be offered in behalf of the present rule which has remained unchanged for the life of the Republic.

Senator AUSTIN. Mr. Chairman, may I ask a question?

Senator NORRIS. Yes.

Senator AUSTIN. Before we get away from the subject of the finality of the action of a State, I should like to ask you a question. I call attention to the immediate situation. The Supreme Court of Kansas has held that rejection is not final, though it has held that assent is final. On the other hand, Kentucky by its highest court has held that either one is final and exhausts the power. In connection with that I wish you would discuss another element of this matter that I think underlies the proposition of submissions directly to the people for their action of an amendment to the fundamental law. You assume I am putting a hypothetical question.

Mr. COLBY. Certainly.

Senator AUSTIN. Assume that the trend of our time differs to a large extent from the trend at the time of the creation of the Constitution; that the present trend is toward the centralization of authority in Washington and a nationalization of all things, social, economic, and political. Is that not a condition that ought to be given realistic study by the Congress in proposing an amendment of this character relating to the fundamental law, and is it not a sound reason for amending our method, the alternative method of action by convention, to direct submission to the people as qualified voters for their expression for ratification or rejection, in order to offset, if possible, or overcome the trend which seems to us contrary to American ideals? Perhaps I have made it so involved that it is difficult to answer.

Mr. COLBY. You have made it very clear, and I agree with you as to the importance of the point. I have in mind to discuss it.

Senator AUSTIN. I am sorry I interrupted you.

Mr. COLBY. Let me answer you now. There are many formulas in the discussion and formulation of legislation. I remember during the war when Congress was beset with innumerable far-reaching and important economic questions. It got to be a regular formula of congressional legislation that the question should be left to the Executive with full power to act as he might see fit. It shifted the burden from Congress to the Executive on many important questions that required prolonged research and difficult investigation. It turned out to be a burden upon the President at that time that was beyond human power to sustain. It sounded well. It reminds me of the two men who were discussing grand opera and classical music. One of them said: "You must have patience and remember this music is a good deal better than it sounds." [Laughter.]

Now, this proposal to put the burden on the people by giving them the direct vote on a constitutional amendment, seems to me to be much the same. Let us look at it from a realistic point of view. The people do not know the arguments for or against the constitutional amendment. You have seen that yourselves in the legislatures of various States where constitutional amendments were submitted to the people. They appear on the ballot in fine print, together with the names of numerous candidates. What is the result? The votes on the constitutional amendment sometimes amount to less than 15 percent of the vote polled at the election.

It is form without substance. It is an expedient, but it does not achieve the desired result. I discuss this again in the order in which I have arranged my topics, for the purpose of reducing to a minimum my transgression upon your time. I am following my notes pretty closely to economize time.

The resolution before us provides that the people by direct vote in general State elections shall determine the action of their State for or against the proposed amendment. I maintain this is not in the interest of expedition, as it may postpone action for at least 2 years in many of the States that hold their elections at 2-year intervals, in contrast to the year and one-third, which is the average time which amendments of the Constitution have heretofore required. In Alabama, I may add, under its State constitution, general elections are held every 4 years, a delay, before any expression could be obtained from that State, of nearly 6 months more than the longest period recorded in our history for the ratification of an amendment.

Senator NORRIS. Let me suggest that the committee has gone over this proposed amendment with a view of making such changes as might be thought necessary, and the one you are now referring to has been up for discussion in the committee. The reason I interrupt you is to get your idea.

Mr. COLBY. Yes.

Senator NORRIS. The suggestion has been made that, instead of providing for the submission of amendments at the general election, they should be submitted at the election at which Representatives in Congress are elected.

Mr. COLBY. I think that is a step in the right direction. I did not know that. I have before me merely the text of the resolution. But I should go a little further than that. I think the question of the amendment is so important that it should be the sole and only topic before the electorate at the time they give the approval of their State or vote to reject it. Let me call your attention again to the point Professor Burgess makes, with which I began my discussion this morning. There is no limitation that can be put upon the text of the amendment. The only test of its legality, of its validity, is that it must be in accord with the amending clause of the Constitution. It is entirely possible to eliminate every guarantee in the Constitution. A matter so important as this demands not celerity, not ease, but demands care, demands the best expression of the true popular will that our ingenuity can provide for.

This point was under very close consideration by the Supreme Court in the prohibition cases, reported in 253 U. S. The adoption of the amendment was upheld notwithstanding Article X of the Constitution, reserving to the States all powers not expressly or by implication

granted to the Federal Government. I want to discuss that further in a moment.

Senator NORRIS. If you will permit an interruption at this point, I was in doubt as to whether the course that was followed in the preparation of the resolution should be taken, or whether without reference to any provision of the Constitution we should simply provide for the methods set forth in the resolution. If I had pursued that course I would not have repealed article V, but you will notice that article V has in it not only the method of submitting amendments, but also has in it the clause which says no State shall be deprived of its equal representation in the Senate. I did not want to repeal that. Therefore, in deciding upon the method to be pursued, I put in the identical language in which it now appears in the Constitution.

Mr. COLBY. I think you have succeeded, so far as the present amendment is concerned, in retaining that section. But the point is deeper than that. The amending power gives the people by amendment the power to excise, destroy, annul, any of the permanent and basic guarantees of the Constitution. In other words, Senator Norris, this perhaps meets the situation as of today, but it does not prevent the elimination by amendment of that very section. It can be stricken from the Constitution by amendment tomorrow.

Senator NORRIS. In my judgment, such an amendment would never get to first base, as a practical proposition, in the House of Representatives or in the Senate, or before the people, as I see it. It might be argued that such an amendment in theory is proper and ought to be enacted, but you never could get the States or the representatives representing the States, particularly the small States, to agree to the elimination of that particular language.

Mr. COLBY. Right. Now, I come back to the point I was making that the real guardianship of the Constitution is in the vision, the conscience, and the good judgment of the people. Article V has not proved unsatisfactory. As I said before, 80 percent of the amendments that have been submitted to the people have been ratified. The process of amendment now in effect is the real guaranty of protection to the Constitution. That is the question I am going to leave with you for your conscientious consideration. In my judgment, the protection of that safeguard requires the highest citizenship and statesmanship of which the people are capable. That is a digression, of course.

Senator AUSTIN. Before we get too far away from your comment about the powers reserved in the tenth amendment, I want to say that interested me and I believe your statement is accurate. I believe it is true that the tenth amendment really made no reference to article V of the Constitution, and did not reserve the amending power. It reserved only the nondelegated powers, and previous to the tenth amendment those powers had already been delegated. I think the amending power is made up not only of the Congress and the Federal Government, but also of the States, the people, speaking through their State legislatures in the one instance and conventions in the other; but the essential characteristics of the amending power, it seems to me, rest in the people, and it is the voice of the people that gives validity to that fundamental law. You, no doubt, recall our experience with the recent attempt to use the convention method.

Mr. COLBY. That was in reference to the twenty-first amendment?

Senator AUSTIN. Yes. I would like to ask you if it has not occurred to you that it would be more ideal if we should retain the best that is in article V, and improve it by the suggestion of Senator Norris; that is, to refer to the legislatures all questions that involve special study, skill, or experience, and refer to the people for direct vote, in the method proposed by this amendment, that affect the emotions and judgments of the people and are understood clearly by the people?

Mr. COLBY. Ah, if understood clearly. If understood clearly. Is it conceivable, Senator Austin, that there could by any chance be such a situation that an amendment of this kind could be submitted to the people that would be clearly understood by them? From the moderate degree of study I have given to the subject, I am of the opinion there could not. In other words, if the people do not give their judgment through the State legislatures, they can go to the ballot box and drop in a blind yes or no on a proposition they cannot pronounce, much less read or understand. You will remember that Mr. Dooley was asked by Mr. Hennessy what he thought about "the new thing they called the initiative and referendum," and Hennessy said: "I have often heard of and voted for things in my life I didn't understand, but this is the first time I was ever called on to vote for something I could not pronounce."

The people are the eventual reservoir of political power in theory and in fact, but the framers of the Constitution recognized their difficulties by providing that amendments should be considered by deliberative bodies, after debate and full consideration, either through the legislatures or conventions chosen with reference to that subject, and presumably composed of men capable of examining so important a question. The people cannot understand these things. They will not read them. It is an illusory and vain assumption that they will. We are dealing with an amendment which gives irresponsible elements of the community wider and wider power.

The Supreme Court has discussed that question. It was presented very adequately by no less an advocate than Elihu Root, and it was held that the amending power was capable of striking down any constitutional guaranty—free speech, free worship, free press, any of those things which constitute the foundation of democratic freedom.

Senator AUSTIN. Was that in *Kansas* v. *Colorado*?

Mr. COLBY. I forget the names of the parties in those cases. They are referred to as the prohibition cases and are reported in 253 United States.

Senator AUSTIN. I have observed that point discussed in 206 United States, I believe.

Mr. COLBY. It was in the main prohibition cases.

Senator AUSTIN. There were other cases of the same nature in the Federal courts.

Mr. COLBY. This conflict between Kentucky and Kansas must eventually go to the Supreme Court. It cannot be solved otherwise.

In the State of New York at the last election there were nearly 3 million registered voters. Of this number only 838,000 voted on an amendment to the State constitution lengthening the term of the Governor from 2 to 4 years. Another amendment was adopted at the same time by a vote of only 743,000. In other words, the average vote on these constitutional amendments amounted to less than 15 percent of the registered voters. I mentioned the fact that general

elections in some States are held 2 years apart, as contrasted with 1⅓ years required to amend the constitution under the present practice. Alabama has a general election every 4 years. Before that State can speak 4 years must elapse.

Senator AUSTIN. What is the situation in New York? You have made some changes in your constitution. Have you changed the period of general elections?

Mr. COLBY. No.

Senator AUSTIN. Someone told me it would not be long before New York would hold a general election only once in 4 years.

Mr. COLBY. It may have some merit, but I am not so sanguine as to that.

Senator AUSTIN. That has some bearing on the point that you are making.

Mr. COLBY. Yes. The use of general elections for a vote on constitutional amendments is directly contrary to the trend of thought which has prevailed for many years. It has been recognized as contrary to the public interest and as tending to confusion to have the electorate cast its vote on such matters at a general election. The questions to be decided at a general election are many and diverse in character, and confusing to the average intelligence. The average voter cannot have all the information necessary for the intelligent casting of his ballot. The thing that suffers is the constitutional amendment. It is a truism in politics that the small votes cast in State elections upon constitutional amendments reflect the unwillingness of the people to concern themselves with such questions. Their slogan seems to be: "When in doubt, don't vote." This explains the fact that the percentage of votes cast upon proposed amendments is, as a rule, the lowest for any propositions or candidates on the ballot. Bear in mind that we are aiming at an expression of the will of the people. Can that be given by a vote of that character?

Senator AUSTIN. I would like to ask you another question, if you will permit it.

Mr. COLBY. Certainly.

Senator AUSTIN. If it will interrupt you, I will not do so.

Mr. COLBY. Not at all. I am perfectly willing.

Senator AUSTIN. I recall a very learned debate at the time the repeal of the eighteenth amendment was under consideration, concerning the question whether Congress has the power to regulate those conditions, and if so, whether it could make those conventions responsive to the will of the people.

Mr. COLBY. Yes. There were a number of discussions along that line. I have been reviewing some of them recently. Many of the States have adopted laws regulating the procedure of State conventions called for the purpose of acting upon constitutional amendments. I think it is clearly within the power of Congress to provide the method of organizing and other necessary details to make the conventions effective and efficient, and if there is any conflict with State law on the subject, or if there is no State law on the subject, the act of Congress is the law in that situation.

Senator NORRIS. Assuming that condition, what would occur if Congress did that? Could the States be required to pay the expenses of holding those elections and pay the salaries of the delegates that were elected to pass on the proposed amendments?

Mr. COLBY. I have given no thought to that. I am inclined to think that question would be raised in comparatively few instances. I think the States would do it.

There is another point, Senator Austin, about which I would like to say just a word. Of course, we can have a convention at which nothing except the amendment would be discussed, and it would be discussed in the campaign for election by the candidates or by others in their behalf. That is part of the salutary process of informing the public as to what is in the amendment. I think the delegates would be elected because of their position on the particular question.

Senator NORRIS. They would be elected because of the position they took on the proposed amendment.

Mr. COLBY. Yes.

Senator NORRIS. That would be the only question at issue.

Mr. COLBY. I do not see any quarrel with that, do you?

Senator NORRIS. No; I do not quarrel with it. After they were elected they would be acting a good deal like Presidential electors now do.

Mr. COLBY. Yes.

Senator NORRIS. They would cast their vote as the people who elected them wanted the votes cast.

Mr. COLBY. I think there would be no arbitrary or unyielding circumstances in the election that would close their minds to further and broader information. I think their position would be analagous to the position of members of Congress. I do not think any member of Congress regards himself as absolutely bound to observe the wishes of the people.

Senator NORRIS. Oh, no. He is not elected for that. He has a good many questions to consider, too many, I sometimes think.

Mr. COLBY. It does not preclude debate and the exchange of opinion and knowledge that comes to the mind of the members of the convention as a result of their meeting and discussing the issue.

Senator NORRIS. And those elected might vote one way, although they made their campaign for election by taking the opposite view.

Mr. COLBY. Precisely.

Senator AUSTIN. You might have the same situation as you have in the election of Representatives to Congress. You might have that same process of public debate upon the issues framed in the constitutional amendment.

Mr. COLBY. The question is, Are you aiming at the best and most representative expression that you can obtain from the people as a whole, or are you going to contend for a process which upon its face may have much to commend it, but which you know to be ineffective for the realization of the end you have in view, which is the representative and authentic expression of a sufficient number of people to be fairly expressive of the wish of the people? That is the question. We do not want a proposition which we know in our hearts will not accomplish what it purports to accomplish. A 15-percent vote of people at a general election, at which the ballot may carry 200 pages, as it does in California, is not representative. The voters are either unable or unwilling to give consideration to such questions. They feel that their representatives should perform that duty; that they are elected for that purpose, and that the due deliberation which such

questions require should be looked for in those who have assumed the task of mastering them and have been chosen for that purpose.

The use of general elections is contrary to the current of thought which has prevailed for many years on the improvement of our election system and machinery. It has long been recognized as contrary to the public interest to confuse or burden the electorate in casting their votes at a given election. Thus in many States it is provided by law that there shall be a complete separation of State and national elections and of State and municipal elections. We have watched that very carefully in the State of New York.

The questions which the voters are called upon to decide in a general election differ widely in character, interest, and importance. The alinement of the voters is determined by different considerations of party and grouping. The questions involved in an amendment to the Constitution, despite their supreme importance, are apt to be decided in obedience to mass pressures, springing from considerations of diverse character and secondary importance. In an election the rival candidates strive for the favor of the electorate. A constitutional amendment is a matter for caution and care and not for the hustings. As I have said, the power to amend is the power to entirely eliminate the most important features of our Constitution.

The question, in approaching a subject like this, is whether we want to relax the restraints or preserve them, particularly when the established process, if I may use that expression freely, has operated so wonderfully well throughout the course of our history. And I repeat that the delay is in the proposal field, not in the ratification field, and there is where there should be delay. If the two Houses of Congress cannot agree on a constitutional amendment, it does not deserve to pass.

Senator NORRIS. That is all retained in this proposed amendment.

Mr. COLBY. I know, but the difficulty in reaching an agreement is illustrated by 3,148 amendments proposed in Congress, and there is where the delay is. It is not in the ratification process, which is shown by an 80 percent ratification record.

Senator NORRIS. Would you advocate that an amendment should not be required to receive a two-thirds vote of the Senate and the House?

Mr. COLBY. Not at all, but I mean to say that all the delay in the amending process is in the field of proposal, including the concurrence of the two Houses. That is where the unsupported amendments should die.

Senator NORRIS. Is not that a pretty good graveyard for them?

Mr. COLBY. I think it is an admirable one.

Senator NORRIS. We are leaving it just as it is, in that respect.

Mr. COLBY. But you are not moving in the direction of speed when you tinker with the ratification process, because there has been no delay there.

Senator NORRIS. We have a very important illustration in a 14-year delay.

Mr. COLBY. I would not call that a delay. I would call that a difference between the proponents and the American public. The latter do not want it or they would ratify it.

Senator NORRIS. This amendment would do away with all that difficulty. Once rejected or approved, that would end it.

Mr. COLBY. But you do not have the time to tell the people about it before it is voted upon.

Senator NORRIS. The long delay in the Senate and House would be likely to give a history of it.

Mr. COLBY. But there is where the delay is.

Senator NORRIS. I do not see on what basis you have a right to assume it would be easier to secure a concurrence of the two Houses in submitting an amendment under the old system.

Mr. COLBY. I do not.

Senator NORRIS. Then you have not touched the problem of delay. Am I not right about that?

Senator AUSTIN. It has been my intention before we finish consideration of this resolution, to study the proposed amendment that would avoid that effect. I am thoroughly convinced that amendments should be submitted and acted upon in sufficient time to reflect the spirit of the people of this generation.

Mr. COLBY. Why could you not accomplish that very logically by fixing the time for the election?

Senator AUSTIN. I think we can do that.

Mr. COLBY. Fix a time for the action of the States under the present rule. You could fix 18 months and have justification for it. It seems to me that is a satisfactory way of approaching the question.

Senator NORRIS. It seems to me we are in danger when we undertake to fix the time. We may fix a time in which the States shall act, and then may find that it requires further investigation.

Mr. COLBY. Yes. May I pass to another point, and I am nearly through. You have already touched upon it, Senator Austin.

I should like to say a word in the light of the current and powerful trend to disregard State lines and the limitations upon Federal power which have hitherto been respected and observed. I think if State lines are to be continually broken down and the Federal Government suffered to take over more and more power which the States have hitherto regarded as their own; if the Government is to become overwhelmingly nationalist, it is certain that the cry will be heard that Congress should be elected along nationalistic lines. It is already strongly urged that the Senate should be made more representative of the people of the United States. The dissolution of State lines cannot continue indefinitely, or go much further, without breaking down the rules which gives to the less popular States the same representation in the Senate enjoyed by the larger States. A nationalized democracy may not patiently tolerate an upper house in which representation is not based on the majority principle.

Senator AUSTIN. Will you permit an interruption at this point?

Mr. COLBY. Yes.

Senator AUSTIN. I think it should not pass unnoticed that under our present legislative and administrative system the practice is contended for of the appointment of high-salaried administrators without approval by the Senate. I mention that in passing as bearing upon the point you are making, that the great populous States have the power to influence the opinion of administrative officers, which deprives the small States like my own of fair equal representation on the administrative side of the Government.

Mr. COLBY. Yes.

Senator AUSTIN. It is a matter of concern and should be made well known to the public.

Mr. COLBY. I think that observation is most just.

By this amendment Senator Norris proposes to resist this trend as it affects equal representation of the States in the Senate, but he must perceive that it is but a question of time when equal representation in the Senate will be challenged as inconsistent with viewpoints already adopted by Congress and sustained by a certain section of public opinion. The challenge is now at the very doors of Congress. It may prove the precursor of the broadest attack upon the whole theory of State rights which we have seen. It could spell their final destruction.

I had in mind to say a few words on the so-called disparity between the population of a State like Nevada and a State like New York. At the time of the adoption of the Constitution the population of Virginia was 13 times that of Delaware. New York now has 130 times the population of Nevada. Yet the two States have equal votes in ratifying a proposed amendment. Manifestly, it would have been unfair to the larger States to allow equal weight in the Senate to the smaller States and not provide that much more than a majority of the States should be necessary to a change in the Constitution. There is one way of equalizing the result of such votes, and that is by requiring for the ratification of amendments a large number of States, which would in a sense equalize the tremendous disparity in the population of the States. I have no doubt that is one of the reasons why the present amending article has proved so satisfactory to the people. There is nothing wrong in theory that three-fourths of the States shall be required to ratify a constitutional amendment when that disparity exists.

It is often said that 13 States can defeat 35 more populous States, and thus prevent the ratification of an amendment. With the substitution of 17 for 13, two-thirds for three-fourths, the argument is little changed. As a matter of fact, there has never been any line-up of the States which would present this situation. It lies in the realm of conjecture and fantastic assumption, like those intriguing calculations of the number of shifting votes in a presidential election which would give the minority the choice of a President. Juggling of this sort constitutes no argument. Our history has shown that when changes in the Constitution are desired by the great body of the people, they are made with celerity and ease. The present method of amendment assures the stability of the Constitution, while it is favorable to its orderly revision.

In connection with my somewhat disjointed presentation of this subject, let me quote a sentence or two from Bryce:

> A swift and easy method would not only weaken the sense of security which the Constitution now gives, but would increase the troubles of current politics by stimulating the majority in Congress to frequently submit amendments to the States. The habit of amendment would turn into the habit of tinkering.

He further says:

> The rights of the States, upon which congressional legislation cannot now directly encroach, would be endangered.

By reducing the number of States necessary for ratification, I think we are moving in the direction we have always endeavored to avoid—a political and a geographical cleavage. Such a reduction tends to increase the undesirable grouping of States according to sectional or political interests. The Western and Southern States could more

readily unite in supporting an amendment favorable to the Western and Southern economic interests or political aims, as against the Northeastern States; the Pacific Coast States, and the States of the Atlantic seaboard against the States of the interior of the country. The prevailing scheme of taxation might bear more heavily upon some States than upon others, and lead to mutually antagonistic groupings. The Constitution could easily reach a point, if the number of ratifying States is reduced, where it will reflect the temporary and shifting dominance of localities rather than the broad underlying interests of the Nation as a whole.

Certainly, an amendment tending to such cleavage would be a clear departure from the intention of the framers, which was to bind the country as a whole in support of broad national principles which should constitute our fundamental law.

In reading the resolution I have noticed two omissions which seem to me worthy of passing reference, and I submit them to you for your own consideration, if you think they deserve it. There is nothing in the proposed amendment providing that Congress may specify ratification by convention. Do you not think such a provision is worthy of consideration?

Senator NORRIS. Yes. That is another thing that the members of this committee have discussed among themselves.

Mr. COLBY. I dare say.

Senator NORRIS. We have considered whether we should retain the amending power now existing by conventions, or even by legislatures, and add this other method, giving Congress the power to prescribe which of the methods should be used. I would not have any objection to that, while I do not think it is necessary. I see no serious objection to leaving that in, if the committee feels that way about it.

Mr. COLBY. I have no doubt that will receive your serious consideration.

There is a further provision in the present article 5 that the people, through their legislatures, acting through two-thirds of the States, may initiate the proposal of an amendment to the Constitution. I notice that has been omitted.

Senator NORRIS. That might be retained, although I think it is generally agreed that it has never been availed of so far in the history of the country.

Mr. COLBY. Except in 1893, when 33 States took that action.

Senator NORRIS. The difficulty, as I see it, in calling for a constitutional convention, which has never been availed of, except in the case of the 33 States you mentioned, is in reaching an agreement. I can see, if all the States took action and Congress refused to act, that we would not get any further. If Congress did decide to act, it would have to agree upon representation and the method, and probably there would be such a disagreement that there would not be any conventioned called. Those things are all unknown factors. We have never had to face them, but we would if we were to undertake to have a constitutional convention.

Mr. COLBY. I remember once going to see President Wilson. It was during the war. He had a pile of papers on his desk which he was laboriously signing. He motioned me to a chiar, and in a moment he pushed his chair back and said: "Colby, do you know that I have come to the belief that one of the chief duties devolving upon the

President of the United States is to keep his shirt on." That is the spirit in which I am speaking today. Article V has stood up through years of struggle. We have maintained our stability as a republic. No other republic in the world has come near to our record.

I trust I have indicated to you the importance of examining this proposed amendment with the utmost care. It is a serious thing to depart from a rule which has maintained itself against all criticisms and repeated attack for a century and a half. This is particularly true, if I am correct in my belief that the ends sought by the proposed amendment will not be attained, but on the contrary, that the proposed changes will operate diametrically against their attainment.

It is right and our duty to consider the disturbed condition of public opinion at the present time. Strangely assorted forces, with their dissolvent theories, have caught the fancy of many elements in our population which are not conspicuous for poise and sober thinking. It is not a time to embark lightly upon fundamental changes. Let us not abandson moorings which have held against storm. Let us not play pitch and toss with the national safety. A leap in the dark is not the best approach to so grave a matter as the amendment of the Constitution, particularly an amendment of the most important provision which the Constitution contains. Is it not better, when so many people are losing their heads, for us to hold fast to that which has proved to be good?

I thank you very much for your courtesy. [Applause].

Senator NORRIS. Thank you very much for your statement.

Senator AUSTIN. I think this committee has attempted to carry out that message of St. Paul to the Corinthians to which you refer, and to hold fast to that which is good. I think the committee is striving to improve the situation and, in all probability, will consider favorably the alternative method of amendment.

Senator NORRIS. There are several other witnesses present, some from New York. It is almost 12 o'clock. I think we might adjourn until 2:30.

JOHN B. TREVOR (American Coalition). Mr. Chairman, some of these people might be satisfied to register their position on this matter, endorsing the splendid statement of Mr. Colby, and save your time in hearing a good many witnesses.

Senator NORRIS. I anticipate there will be a number of witnesses. If any of them desire to express their endorsement of what Mr. Colby has said, they may so indicate to the reporter and it will appear in the record.

(The following registered their names in approval and endorsement of the statement of Mr. Colby:)

Ruth D. Walworth, representing the League of Republican Women.

James L. Wilmeth, national secretary, National Council, United Order of American Mechanics.

Viola Henley, State councillor; Ruth Warren, State vice councillor; Vera V. Myers, State outside sentinel, Daughters of America.

STATEMENT OF COL. FRED B. RYONS, CHAIRMAN LEGISLATIVE COMMITTEE, MILITARY ORDER OF THE WORLD WAR

Colonel RYONS. My name is Col. Fred B. Ryons. I am appearing as chairman of the legislative committee of the Military Order of the World War, an organization of officers who saw service with the

Allied Forces in the World War. I ask permission to read into your record a resolution passed by our order at its meeting in January 1933 as follows [reading]:

Be it resolved, That the commander in chief be empowered to take measures by action of national headquarters and the cooperation of the chapters and the membership of the order to oppose any proposals or legislation to change the fundamental principles of the Constitution of the United States or in any way to modify the existing methods of constitutional amendment.

Our order is opposed to the method suggested in this resolution or any method of amending the Constitution by popular vote. The American citizen in general is a busy man. When he is confronted with sickness he employs a doctor; when he has litigation he employs an attorney; and when he goes to the polls, he elects a State senator in whose judgment and training he has confidence to the end that his constitutional rights will be protected.

Should you, as contemplated in Senate Joint Resolution 134, provide for amendment of the Constitution by popular vote, you will create a condition under which the intelligent voter, due to his lack of information and lack of time to study deeply into our needs and the history of constitutional government, and to satisfy himself he is voting intelligently, will say, "I do not know enough about this amendment to the Constitution they are proposing and I will not vote for or against it." Other citizens who often think they know more than they do will vote for or against an amendment without a proper conception of the effects of their act. You gentlemen know the reading, understanding, study, and intellect needed to judge properly the placing of a comma in this document. It is absurd to ask our citizens to qualify themselves for such a task.

For a man to doctor himself when he is deathly sick is foolish, but after all only one may die. For a man to defend his case at law when he knows little about the law or procedure is almost fatal, but only his wealth is endangered. For the uninformed voters to tamper with the Constitution in the light of the history of the past constitutional governments is national suicide.

I concur in the statements already made in opposition to this resolution, and will not fill the record with repetition. I wish to thank you for this chance to appear before your committee.

Senator NORRIS. The committee will recess until 2 o'clock.

(Whereupon, at 12 o'clock noon, a recess was taken until 2 p. m.)

AFTER RECESS

At the expiration of the recess, the hearing was resumed, as follows:

STATEMENT OF MERWIN K. HART, PRESIDENT, NEW YORK STATE ECONOMIC COUNCIL

Senator NORRIS. You may proceed, Mr. Hart.

Mr. HART. Mr. Chairman and Senator Austin, it is a little difficult, I find, to follow an address such as was made this morning by Mr. Colby. I am only going to take the time of the committee for perhaps 8 or 10 minutes, pointing out certain things that seem to us in the New York State Economic Council, which I represent, of importance in connection with this proposed amendment.

We consider this is perhaps the most important of all of the several thousand amendments that have been submitted since the beginning of the United States. I come here to respectfully oppose the amendment that is set forth in Senate Joint Resolution 134, for the following reasons:

First, the proposed amendment eliminates the right of the people to originate amendments through their State legislatures. This method has rarely been used. But its existence is an assurance to the people of their ultimate sovereignty, and it should be preserved. For it seems to me the legislatures, which are more frequently elected and sit in the midst, as it were, of their constituents, are close to the people, and hence are peculiarly responsive to their wishes.

Second, it is not wise for an amendment to the Constitution of the United States to be considered and acted upon at a general election; for at such a time a full understanding of an amendment would tend to be prevented by the pressure of other questions. An amendment to the Federal Constitution should be passed upon, so far as possible, at a time and under circumstances when the fullest attention of those, whose duty it is to say "yes" or "no," can be given to it. For the highest duty that a citizen has a right to exercise in defense of his liberites is in passing directly or indirectly upon an amendment to the Federal Constitution.

Third, under the text of the resolution it would be possible for an amendment to be suddenly sprung on the voters within 60 days before the general election at which the voters are to vote. Having in view the complexity of our lives—the mutiplicity of affairs with which most of us must concern ourselves in this twentieth century—it would be practically impossible for the voters to acquaint themselves within so short a time as 60 days with the effect or the implications of any proposed amendment.

Senator NORRIS. I was just wondering whether you would rather not be interrupted at each point you were making and complete your statement before we ask you any questions.

Mr. HART. I do not care, Senator; either way you want is agreeable to me.

Senator NORRIS. I would like to ask you about your first objection. I think that is that the provision in the present Constitution about the State legislatures having the right to originate amendments, even though never utilized, still has a very beneficial influence. Your objection on that point could be fully met, could it not, if we left that in the Constitution as it is now?

Mr. HART. Yes: if that were left in, that would obviate that objection.

Senator NORRIS. There is another point I want to ask you about.

Mr. HART. About the amendment being considered at the time of the general election?

Senator NORRIS. Yes. That question has been discussed by the committee, and I have personally given it a good deal of thought. I realize that in theory, at least, it is best to have this or any amendment proposed by the Congress voted for at an election, if an election is to be held, at which no other question would be involved. That is the objection you make to that, as I understand it, that there are so many other issues in the campaign that they would prove confusing to the voters?

Mr. HART. That is the objection.

Senator NORRIS. That objection is realized by those who favor the amendment. The question arises, if you must have special elections all over the United States to do that, in the first place, the expense would be very great. Who would pay it? Would the States pay it or the Federal Government?

Mr. HART. Is it not true that at the time of the submission of the amendment that repealed the eighteenth amendment that was by conventions, and I think New York State paid that expense.

Senator NORRIS. I think perhaps that is true.

Mr. HART. I assume that would be the case.

Senator NORRIS. Suppose we left in the amendment the present method by conventions, so that Congress could, in submitting the amendment, provide that it could be done in that way or the other way, would that objection be met?

Mr. HART. I think that to that extent that would meet that objection.

Senator NORRIS. I think there is still this to be considered: It is claimed that the people would not give careful consideration to the amendment, because they would have so many other issues to consider at the same time. I think I realize the force of that objection, but would not that happen, anyway? Suppose we call a special election, would you anticipate that there would be as many people come out to vote at that special election as come out now when we have all these other questions involved, and people are induced to come because they are interested in John Doe for sheriff or Richard Roe for treasurer, or somebody for President, or someone who is a candidate for Congress? If those things were taken out of the campaign, would not the result be that very few people would come out to vote?

Mr. HART. No; I do not think that is the experience. I think perhaps there is a theoretical advantage in the method of having it voted upon at a general election, but I think as many people would come out to vote at a special election as would come out at a general election. It seems to me that, in spite of the fact that a large number may be induced to come out at a general election, a considerable number who do come out do not vote on these all-important questions.

Senator NORRIS. That is undoubtedly true.

Mr. HART. Mr. Colby this morning cited some figures which are very interesting. I think a great many of them would be thinking about candidates for the local legislature, or something of that kind.

Senator NORRIS. That is true. Assuming that to be true, if the people are given the opportunity to vote, would we not get the more intelligent voters to pass on it, no matter how or when we submit it? If we are going to compel to vote on it, people who do not care anything about it, we would be submitting it to the most unintelligent portion of the voters who, while they might come out and vote, would be as liable to vote wrong as they would to vote right.

Mr. HART. I think perhaps this illustration would be analogous, although it may not be applicable. If we were to go into a picture gallery having many pictures in it, and there was one picture there of more artistic value than any other, we might easily overlook that picture, unless we were particularly looking for it; whereas if we were to go to an art gallery and enter a room where the only picture was the

Sistine Madonna, it could not possibly escape us. It has been our experience in our State that when there has been a special election for amendments to the Federal Constitution, only a minority of the people would come out and vote at the election. Even though in the respect you mention that might be preferable to a general election, still it does not get the attention of so many people.

Senator NORRIS. Mr. Colby this morning gave us some figures in respect to the vote on the New York constitutional amendment, and the number who did not vote on it at all, contrasted with the total number of votes cast. Would not the same class of people remain at home at the general election?

Mr. HART. No. I think the campaign of candidates for office would cause people to come out and vote, and enable them to vote more intelligently.

Senator NORRIS. I suppose we are all moved more or less by our own experience with similar matters in our own States. You have just mentioned what happened in New York. I remember some 12 years ago, when there was an election for United States Senator, we had on our ballot three initiative laws. As far as the voters are concerned, it was the same as an amendment to the Constitution. They were printed on the ballot the same as amendments to the Constitution.

It happened in that campaign that I was a candidate for reelection to the Senate, and we had a full ticket of Governor and all State officers, as well as Senators and Members of the House of Representatives. I think I state the fact when I say there were only two candidates in that campaign, and I was one of them, who mentioned those initiative laws that were on the ballot, and which were submitted just like a constitutional amendment would have to be submitted. I think it is fair to say that most of the candidates in that campaign perhaps refrained from discussing them, because of the fear of losing votes if they took sides on those particular matters. As a matter of fact, when the votes were counted I do not remember now the number of votes, whether there were more or fewer than the votes for the candidates—but one of those amendments was carried by a majority, speaking from memory, of over 100,000. In my State a 100,000 majority is a tremendous majority. Another one was defeated by nearly 100,000. They were interested in those laws, but the politicians would not discuss them. They were, in fact, neglecting them.

It seems to me whether an amendment is approved or disapproved is going to depend upon whether the people take an interest. If they do not, they will not vote for it. I think you would get just the same result with amendments to the Federal Constitution.

Mr. HART. I wonder if, in the case you speak of, the total aggregate number of votes for and against bore an appreciable ratio to the total vote cast for State officers.

Senator NORRIS. I do not know whether they did or not. If I had known that would be discussed I would have looked it up. But I was impressed with the large vote on those laws. One hundred thousand majority in my State is a very large majority. Ordinarily 10,000 or 15,000 is a big majority. Probably it would not be considered large in New York but compared with the number of votes that we have in Nebraska, it showed that the people had a great interest in it. It would be too much to assume that the two candidates in that campaign who discussed those questions in every speech that they made,

the candidate for attorney general and myself, were responsible for that majority. I will not assume for a moment that what we said created all that interest. Nobody could assume that. It showed that the people were interested in those particular laws, and voted one way or the other on them.

Mr. HART. That was the initiative?

Senator NORRIS. That was the initiative.

Mr. HART. They had evidently studied those questions. They were exercising their knowledge. They were taking the initiative, you might say. It seems to me that perhaps the only thing in the entire Federal Constitution, whereby the people may themselves, through the respective legislatures in the different States, initiate a change in the fundamental law, is in that provision of article V.

Senator NORRIS. How does New York pass on amendments to her State constitution? Is that submitted to the people?

Mr. HART. Yes.

Senator NORRIS. At a general election?

Mr. HART. Yes; always.

Senator NORRIS. How has it worked? Has it been satisfactory?

Mr. HART. In the number of votes that have been cast it has not been, I think, particularly satisfactory.

Senator NORRIS. Has there been any attempt made to improve that method?

Mr. HART. Let me say what the method is and get it before you.

Senator NORRIS. All right.

Mr. HART. A proposal for an amendment to the State constitution must be passed by the two houses in two successive legislatures. Those must be 2 years apart, two successive Senates. With the amendment to the constitution increasing the term of office to 4 years, that probably means that we must take 4 years between the two votes.

Senator NORRIS. Do you believe in that? Do you think it is all right to wait 4 years?

Mr. HART. I do not know that I am prepared to express an opinion on that, Senator. That has just been adopted, and we are not yet acting under it.

Senator NORRIS. Is there not danger that the people will forget about it during those 4 years?

Mr. HART. If it is important enough, I doubt they will forget about it. I presume that is something that the coming State Constitutional Convention will take up. The objective is to have the vote affirmed by two successive senates as well as two successive assemblies, the lower house being called the assembly.

Senator NORRIS. I would like to get your opinion about that, from your experience in New York. Do you think you get better results by having it voted on by two successive legislatures than you would with only one?

Mr. HART. I have never made a study of it. I have never compared the results with a view to answering that question. I would assume there were better results, but I have not made a study of it.

Senator NORRIS. You do have the disadvantage to which you refer in this amendment which you are opposing, of voting for your amendment at a time when various candidates are running for office.

Mr. HART. Yes; fortunately or unfortunately, I do not know which, they have a habit in New York of submitting several amendments

every year, of one kind or another. Last fall there were no less than three.

Senator NORRIS. And yet those amendments were proposed by two separate and distinct legislatures?

Mr. HART. That is true.

Senator NORRIS. We have only 1 year to do it, and do not get nearly as many amendments as you do. It would seem that your plan would result in more amendments that if you did not have that machinery.

Mr. HART. An amendment to the State Constitution of New York is far less important than an amendment to the Federal Constitution.

Senator NORRIS. Oh, yes; I admit that.

Mr. HART. State constitutional amendments in most of the States are very frequent. It seems to me that there is a very great distinction between those. The State constitution is easily amended and is frequently amended. The whole experience of the Federal Constitution is that 36 amendments have been submitted, and the people have approved 80 percent of them. I might say about the amendment that was passed last fall that it has been coming up for probably 20 years, increasing the term of the Governor from 2 to 4 years, from 2 to 4 years for the senate, and of the assembly from 1 to 2 years. Each time before that has been defeated.

Senator NORRIS. Are they not very desirable amendments? Does not your organization favor them?

Mr. HART. I think it is too soon to say.

Senator NORRIS. Do you not think the legislature ought to be elected for more than 1 year, and the Governor ought to be elected for more than 2 years? Do you not think 4 years is a fair term?

Mr. HART. Well, Senator, I did not come prepared to answer that. I think a good deal can be said on both sides.

Senator NORRIS. All right.

Mr. HART. After 20 years of vacillation the State of New York concluded to try it out and see how it works.

Senator NORRIS. I think it will work.

Mr. HART. Four: I submit that it is not in the people's interest that a change in the fundamental law should be accomplished by ratification by two-thirds of the States—rather than by three-quarters as the Constitution now provides. The ability of three-quarters of the States to ratify an amendment to the Constitution means that they may do it even though 12 States, having a population of 71 million people, vote in opposition. To lower the necessary three-quarters to two-thirds would mean that 32 States might force an amendment to the fundamental law even though 16 States, containing more than 82 million people, voted in opposition.

I submit that it has not been shown that Article V of the Federal Constitution has not well served the American people. The underlying thought of the framers of the Constitution was that certain vital parts of our structure in government—and particularly those having to do with our liberties—have been firmly implanted in the fundamental law—in the Constitution; and that the terms of that Constitution itself should make a change in any of these fundamentals a difficult thing to achieve. That this idea was sound, few would attempt to gainsay. No fact in human experience is better recognized than that in important affairs, a delayed decision is invariably a wiser decision.

If, therefore, the purpose of this pending resolution is to make amendments easier, we are flying in the face not only of the wisdom of the founding fathers, but in addition the national experience of 150 years—indeed we are flying in the face of the experience of the human race itself.

The terms of this resolution would permit equally easy amendment of any part of the Constitution—of any one of the existing amendments. Thus, it would be made easy to abridge or to destroy any of those provisions containing the Bill of Rights. It would be made easier to take away the freedom of religion, the freedom of speech, the freedom of the press, the right of petition. It would be easier to take away the right of the people to be secure against unreasonable searches and seizures. The right of trial by jury could be taken away. The right of just compensation for private property taken for public use could be more easily destroyed. Indeed in these days when the right of private property is sometimes made to appear as an evil thing, rather than as a vital part of the system whereby we have developed materially and spiritually in America, it is at least possible that under some emotional excitement and in some crisis, real or declared, a constitutional amendment might be offered and pressed for passage, completely destroying the right of private property.

Article II of the amendments gives the right of the people to keep and bear arms, and says it shall not be infringed. Yet many of the States have passed laws that come dangerously near, if they do not actually accomplish, the taking away of that right. The pretext is that it is desirable that it should be made difficult for criminals to obtain arms. As a matter of fact, criminals seem always able to obtain weapons. And since in many countries where dictatorships have been achieved, the right to bear arms has been one of the first rights to be attacked, it is not beyond the bound of possibility that an amendment might be suddenly placed before the American people, 60 days before a general election, that would completely take away their right to bear arms.

This amendment should, therefore, be considered by the Congress with the idea that they are making it easy at some future time for some demagogue to deprive the people of any or all of their Bill of Rights.

Experience shows that the vote by the people on constitutional amendments rarely brings out as many as half the votes cast by the people for individuals running for office. This I submit makes clear that the people at election time think more in terms of the personalities of candidates than they do in terms of legal propositions. For our people are accustomed to live under a representative government, a government which is a democracy in that the suffrage is universal; but where the belief is that those who are elected by universal suffrage must in the nature of things, since government is so complex, and since the people themselves must attend to their own affairs, be left to make the decisions that government requires.

In the fall of 1936 upward of 5,690,000 persons voted for Governor in the State of New York. At that same election only 2,603,000 persons voted on the all-important proposal to revise the State constitution. The proposal to revise the State constitution was actually voted by less than 25 percent of the registered voters, for only 1,413,000 voted affirmatively.

Some important amendments to the constitution of the State of New York have been adopted by even smaller percentages of the

electorate. It is likely that the principal reason for this is the inability of the average person to understand the pending amendment and his consequent unwillingness to vote either for or against it. I have observed that at the polls many years ago when I was interested in politics and tried to induce people to vote on the pending constitutional amendment. They did not respond. In many cases they were most intelligent people. The reason for that, it seems quite clear to me, was that they did not know how to vote, and refused to commit themselves one way or the other, even on a secret ballot.

How many, indeed, of the electorate of the United States would have a sound understanding of the implications of the amendment proposed by this pending resolution and be able to vote intelligently upon it? Indeed, by being invited to pass upon amendments directly, which might flatter some, rather than have them passed upon by representatives they had themselves elected for the purpose, would they not, in effect, be invited to abdicate their sovereignty?

It is better for the people as a whole that a pending amendment be passed on either by the legislature or by conventions called for the express purpose, as now provided by article V of the Constitution of the United States. For only in a legislative body or in such a convention can there be examination, through debate, by the persons on whom will fall the burden and responsibility of deciding whether an amendment should be ratified or rejected.

Lastly, I submit that in the nature of things haste is not needed in the amendment of the Constitution. Or, if it is needed in any case, our experience with the repeal of the eighteenth amendment shows that where public opinion is strong enough within the space of less than 10 months, 36 States can readily be brought to ratify a submitted amendment. If public opinion is not strong enough, that by itself is ample indication that haste is not needed.

As Mr. Colby said this morning, it would seem that the existing method of amending the Constitution would be more speedy than where you have to wait for a general election. If public opinion is not strong enough to adopt it, I think that is ample indication that haste is not needed.

We ask, therefore, Mr. Chairman, that this amendment be not adopted.

Senator AUSTIN. Mr. Chairman, may I ask a question?

Senator NORRIS. Yes.

Senator AUSTIN. If the Government should become oppresive, then would you believe that it would be a safeguard or otherwise to give the people the opportunity to directly vote upon the kind of an amendment which would limit or attempt to limit the powers of government, that is, in a choice between methods of ratification of a proposed amendment?

Suppose, for example, that a proposed amendment purported to add to the already present and dangerous powers of the Federal Government, is not the danger of such an amendment being ratified by a representative body greater than if it were submitted to a direct vote of the people?

Mr. HART. No; I do not think so, Senator. Of course, it depends upon the circumstances. It would depend upon what the amendment was. I believe that our laws are so complex—and they never have been more so than they are today—that only by adhering to

the tradition that we are not a pure democracy, but a representative democracy, is the only safe road for us to follow. I think the question of whether or not a given amendment should be approved should be left to representatives, carefully selected and thoroughly representative. I believe that is the best safeguard.

Senator AUSTIN. Of course, we often assume a condition for the purpose of study. I have found it very helpful sometimes to do that. Assume that we have in Washington a government that reaches for more power all the time; assume that it has a political strength in the Nation that is extremely large, and that the politicians who put that government into office have been able to put into office in the several States many men of like minds and like philosophies of government. Now, then, assuming that there are pending in the Congress something like 10 different proposals for amendments to the Constitution, among which you find at least one that would turn over to the Federal Government, completely and entirely, a totalitarian power over the lives and businesses of the people. I ask you as a practical matter, do you not think in such a situation as that the people should have the opportunity to act directly upon the question of whether they are going to have added to these powers now exercised by the Federal Government the control and the ownership of property, control over contracts, over the lives of the people? It seems to me that is the extreme test of the question and brings out the methods of the alternative method of ratification, by which the people can directly say whether or not that is the kind of an amendment of the fundamental law that they want.

Mr. HART. I think, Senator Austin, that such an amendment as you just described would probably be beaten either way. I would think that if it were a clear-cut, simple proposition it would be voted down if left directly to the people. But even in such a case as that, I believe it would be voted down more assuredly if there were a thorough examination by debate, both in the campaign to elect the delegates to convention in each State and also during the conventions, if the convention method were followed. The people as a whole will not pass on the intricacies of most of the amendments to the Constitution. I do not think they want to do it. I think they show that by their votes on State amendments. I think they prefer to have it left to the people they elect to represent them. I think in that way we get more real representation of the will of the people than if it is left to a vote at the general election, where the ballots are full of the names of candidates, and there is no opportunity to have the subject discussed.

Senator AUSTIN. I would assume that the study and consideration of a proposal in Congress would inform a large part of our people throughout the country as to the amendment before it ever got into their hands for discussion. Certainly, if we are to have a special election at which to submit amendments to the people, do you not recognize the merit of having the people given the opportunity to pass on such a question as this: Congress shall have the power to take by eminent domain, by the exercise of that authoritative power, all production, manufacture, and mining of the United States? Do you not think the people would understand what that imports?

Mr. HART. I do not think many of them would. I think a great many would not. I think the same advantage you have in mind could

be obtained by the method followed in Massachusetts in 1924 on the child-labor amendment, when they had an advisory referendum. The legislature was not to be bound by it, but the legislature has been bound by it in Massachusetts ever since. They have had the combined advantage of both methods. I am sure that you recall that. The legislature had the benefit of that referendum and also had the benefit of deliberation and discussion and debate.

Senator AUSTIN. It seems to me we have arrived at a condition in our country at the present time that perhaps was foreseen when Colonel Mason made this statement, which appears in the Farrand's Records of the Federal Convention, volume 2, pages 558, 629:

> Colonel Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Are you familiar with that?

Mr. HART. No; I never read that. I might say that I commend what you said about the opportunity to the people to acquaint themselves with amendments pending in Congress, as to the import back of such amendments; but I can remember for 40 years, and I do not recall any considerable discussion back home on these various amendments, with the possible exception of the eighteenth amendment and the amendment for the repeal of the eighteenth amendment, until after action had been taken on them by Congress. Many amendments have come before the Congress since the country was set up, less than 100 of which were finally reported out. It is impossible to get the people to interest themselves and acquaint themselves with amendments pending before Congress. It seems to me consideration begins when the amendment is finally adopted and referred to the States.

Senator NORRIS. Would not your argument apply to Congress? After all, the safeguard is in the initiation of the amendment, and it seems to me that Congress, from your standpoint and mine, has done a good job in cutting down and sifting out.

Mr. HART. I agree with you.

Senator NORRIS. That is provided for in this very amendment we are discussing. That is left just as it is.

Mr. HART. Yes. I agree that Congress has done a splendid job.

Senator NORRIS. When a State is voting on an amendment, it may be adopted by a simple majority.

Mr. HART. Yes.

Senator NORRIS. While that is true, it must be adopted by a two-thirds vote of all the States.

Mr. HART. It seems to me the value of the advisory referendum is worthy of consideration by this committee. That may have been tried in other States. The people have the opportunity to register their will, and there is still the chance after it comes to the legislature, or to the convention elected for that purpose, which seems to me much preferable to the legislative method, that body can take the full responsibility for what is done.

Senator NORRIS. In the Massachusetts case to which you referred, where the legislature took an advisory vote of the people, was that vote taken at a general election?

Mr. HART. I cannot tell you. I do not think it was.

Senator NORRIS. Can you tell what percentage of the people voting in that election voted on the question of advising the legislature?

Mr. HART. I do not have the figures. It was many hundred thousand. It was very substantial. I think 600,000 voted on both sides.

Senator NORRIS. About what is the normal vote in Massachusetts?

Mr. HART. I do not recall. I would be on dangerous ground if I tried to estimate it.

It seems to me that we have a system of checks and balances that is very satisfactory. It is a matter of patience and time. Perhaps it has not always worked well. Yet on the whole I think it has worked very well. Congress never passes an amendment until it has given the most thorough consideration to it. Then what is needed to complete the system of checks and balances? It seems to me it must have the same degree of consideration, the same kind of consideration by each of the States that was given to it by Congress itself. That is not consideration by individuals who come to vote "yes" or "no" upon the proposition. A much broader and deeper consideration is required. A convention or legislature which passes upon a constitutional amendment is certainly performing one of its highest duties, and it cannot fail to take great responsibility and take it far more seriously.

Senator AUSTIN. The citizen shirks the responsibility and passes it to somebody else?

Mr. HART. He does.

Senator AUSTIN. That is true now. This amendment puts the responsibility on him.

Mr. HART. But I do not believe he will assume it. How are the votes built up at the polls in any State, under any party? By political organizations, as a rule, even on the most vital questions. People will vote on one side or another without assuming to know what they are doing, in many cases, some of them most intelligent people that we meet every day who have little understanding of some of the most fundamental problems. I suppose the reason is this life is so complicated they do not have the time to study these questions, and I am convinced that their only safeguard is to leave it to their own Representatives who are carefully chosen to exercise that responsibility.

I thank you very much for the privilege of appearing before you.

Senator NORRIS. Thank you for your very intelligent statement.

STATEMENT OF MRS. FRANCES E. SLATTERY, BOSTON, MASS., REPRESENTING THE MASSACHUSETTS WOMEN'S CONSTITUTIONAL LEAGUE

Senator NORRIS. Will you state your name for the record?

Mrs. SLATTERY. Mrs. Frances E. Slattery, of Boston.

Senator NORRIS. Do you represent an organization?

Mrs. SLATTERY. Yes; I do. I represent the Massachusetts Women's Constitutional League. I think I might explain what that means. In view of the fact that there is so much legislation originating in Congress, a group of us decided it would be a very fine thing if we could come together, regardless of our affiliations in either the Democratic or Republican Party, or our religious affiliations, and just

study legislation as such in Massachusetts and in Congress. With that in view we framed the Massachusetts Women's Constitutional League.

Last Friday and Saturday we had a mass meeting. We were trying to deal with these questions in a fair and intelligent way. We took up Senate Joint Resolution 134 and read and discussed it, and then took up the objections to the resolutions and went over them thoroughly. We had 500 women present. Then we debated it. Many of those women were lawyers. Then we took a vote, and we consider that we represent about 300,000 women. Of course, they did not agree on all the objections, but the most of them agreed that it would be a most dangerous precedent to establish to give the power to the mass of the voters, and we voted to reject it.

Senator NORRIS. What was the vote?

Mrs. SLATTERY. It was a unanimous vote to reject it. After we discussed it, and after the legal-minded women had discussed it, they all voted to reject it on account of the dangerous precedent that they felt it would establish. They sent me down to tell you about it.

It has been a great pleasure to me to have the opportunity to sit here and hear Mr. Colby, and you, Senator Norris, and Senator Austin, discuss it the way you did this morning. It did not seem to me that your minds are closed on the different points that Mr. Colby brought out. From what was said in the discussion here, I feel it is not absolutely final. Is that right?

Senator NORRIS. No; it is not final. It is just tentative.

Mrs. SLATTERY. You are going to discuss it further?

Senator NORRIS. Oh, yes.

Mrs. SLATTERY. And probably adopt some of the suggestions that have been made.

Senator NORRIS. Very likely. I think Senator Austin will agree that some of the suggested amendments will probably be adopted.

Mrs. SLATTERY. That was the decision of about 300,000 women. I think that is a fair statement. We had them there from all over the State.

Senator NORRIS. I am very much surprised that you could have so many women get together and agree on any one proposition. [Laughter.]

Mrs. SLATTERY. On the last Supreme Court fight we did the same thing. We were the first group in America to do it. We were able to send out about a million communications pointing out the danger to the Supreme Court, and we did a fine job of it. [Applause.]

This has been very delightful to me to come down here and listen to this discussion. Senator Austin brought out a lot that was very interesting to women, especially those women like myself who had been mothers and stayed at home and brought up a large family of children. We do not feel that such a sweeping amendment should be adopted until we have had a chance to study it and had discussion and be able to give an honest, candid opinion.

Senator NORRIS. We are very glad to have had you here and to have heard you.

Mrs. SLATTERY. Thank you. It has been a great privilege to be here and hear these discussions. [Applause.]

STATEMENT OF GEORGE E. SULLIVAN, MEMBER OF THE BAR, WASHINGTON, D. C.

Senator NORRIS. Do you wish to be heard?

Mr. SULLIVAN. I would like to be heard on two points.

Senator NORRIS. Very well. Please state your name for the record.

Mr. SULLIVAN. My name is George E. Sullivan. I have been a practicing member of the bar here for over 35 years, and am instructor in one of the law schools, Georgetown University Law School, and have been for about 10 years. One of my subjects is constitutional law.

The two points I want to mention are: First, as to the proposition to eliminate the method of instituting a constitutional amendment through the action of the States. We are in danger today of centralization, too much central power set up by elements favoring facism or communism or whatever you may call it. Under the present mode of amending the Constitution we have the protection afforded against too much centralization on the one hand and too much State power on the other, by providing both mediums; having them initiated by the States if there is too much centralized Federal power, and by the Federal legislature initiating them if there is more State power than there should be. I think that is desirable, because it would be unfortunate and unwise to adopt an amendment to the Constitution that would give too much central power to the Federal Government, or too much power to the State. The Federal Government would have the same power to check the action of the States, and the States would have the power of initiation to check too much centralization on the part of the Federal Government.

Senator NORRIS. I would like to ask you a question, if you do not object.

Mr. SULLIVAN. Certainly.

Senator NORRIS. I think we have in this amendment both of the powers you have referred to, State and Federal. After it is initiated in Congress it must be submitted to the States before it can have any legal effect. If the States want to reject it they can do so. Provision is made for that. In order to adopt it the States must have a majority of two-thirds.

Mr. SULLIVAN. My point is that under this amendment they could not initiate it except through a vote of the Congress.

Senator NORRIS. That is true, but the States never have initiated an amendment.

Mr. SULLIVAN. They started one about 1892. There has never been considered to be too much Federal power to make it necessary, in the past. That is a simple safeguard to take care of the danger we are faced with today.

Senator NORRIS. As I understand it, that never has been applied, and never will be, in my opinion, because there are too many obstacles in the way of getting a submission of an amendment, under the method provided.

Mr. SULLIVAN. According to my view, the Federal Government is becoming too powerful, so that the rights of the States and the people are being submerged. I think it would be most desirable to have

that avenue open of initiating the proposed amendment, in order to get rid of that condition. I have an idea our forefathers thought that was wise when they were framing the Constitution, and the question is whether we should discard it.

The other point I wish to make is with respect to submitting it to a vote of the people, submitting the question of adopting a constitutional amendment to a vote of the people. We all know how the method of submitting such questions to the people has been used in many States. Our forefathers who framed the Constitution had the viewpoint, which to my mind is unanswerable, that it protected the people more, protected their sovereign power, by calling upon them to exercise only those functions they were especially equipped to exercise. Not having them, they felt they should not undertake to pass upon the adoption of laws, either special or general, because they were not equipped to do so; but they allowed them to chose representatives who would be able to investigate the facts and have the necessary ability to deal with the matter fairly and intelligently. Governor Mason expressed a fundamental idea in the Constitutional Convention in substantially these words: "We should not submit to the people any matters that they are not equipped to deal with." I believe he was specifically referring to the direct election of President and Vice President, but the same reasoning will apply to the adoption of laws, either general or otherwise. He said, as I recall his words, at least in substance: "To submit to the people a matter that they are not equipped to deal with would be like unto submitting to a blind man a test of color, because the people in the very nature of things do not have the facilities to carry on an investigation and have not the special knowledge and equipment that would be essential in order to intelligently pass upon them."

To my mind our forefathers showed great and unanswerable wisdom on that point, and I think all of the States that have submitted constitutional amendments to the popular vote have very unwisely departed from that fundamental view, and I hope the Federal Constitution will not be changed so we will also depart from it.

Senator AUSTIN. In connection with your first point, I suppose you are familiar with what the Federalist says about that, No. 43, section 8, which reads as follows:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention, seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors, as they may be pointed out by the experience on one side or the other.

That represents your idea in the first point that you make, does it not?

Mr. SULLIVAN. I think that is a marvelous statement.

Senator AUSTIN. It the committee should see fit to save that element of the present Constitution that would fully meet what you said on that point, would it not?

Mr. SULLIVAN. Yes. I thank you very much.

STATEMENT OF MRS. MARGARET F. ROBERTSON

Mrs. ROBERTSON. My name is Margaret F. Robertson, of Maryland. I do not represent any organization. I just want to tell you that in the matter of giving constitutional amendments to the people it comes down to each party as to whether the people shall vote for it or not. It is passed on by the leaders of the parties, and the people will vote on it as the party dictates. They do not know any more what they are voting on than the man in the moon. [Applause.] If one party tells them to vote the wrong way, they are going to vote that way. We elect our men to office that way, and I think it is utterly ridiculous. It is too much trouble for them to vote for Senators and Representatives and see that they get elected, and when it comes to the amendments to the Constitution they will say, "Oh, don't bother about this amendment," and they do not vote for it. Then you have a good many voters that can't do anything but mark an X on the ballot, and they don't take the trouble to explain it to them.

Thank you very much. [Applause.]

Senator AUSTIN. Is the gentleman here who had the long ballot?

Mr. SULLIVAN. He was Mr. Charles S. Steele, editor of the National Public Magazine. He showed it to me about 2 weeks ago. It was about this long [indicating] and contained several proposed constitutional amendments.

Senator NORRIS. Did it contain the Presidential electors?

Mr. SULLIVAN. I did not notice that.

Senator NORRIS. Probably you will find that to be true. I suppose if we had a proposal here to abolish the electoral college it would meet with the opposition, even though that makes the ballots sometimes 2 or 3 feet long?

Mr. SULLIVAN. I think there would be an objection to abolishing the electoral college.

Senator NORRIS. That has caused the long ballots. That does increase the length very greatly.

Mr. SULLIVAN. I think the trouble with the electoral college is that it has been a formality instead of an actuality, as intended by the Constitution.

Senator AUSTIN. That is the trouble with the convention plan, and was the trouble on the only occasion when it was used. We do not want to proceed with such a solemn matter as the ratification of an amendment to the fundamental law in any such fashion as was done in that case to get a direct expression of the will of the people.

Mr. SULLIVAN. Neither should be permitted to function in that way. It should have been divided and submitted according to the constitutional method. In the electoral college no official of the Federal Government is eligible.

Senator NORRIS. Neither is a banker. I never heard any objection to it on that account. I do not think they want the office. For some reason our forefathers decided that a national banker could not be a member of the electoral college.

Mr. SULLIVAN. No Government official. It was intended to function as a group of able men who would sit down and deliberate and

select a President and Vice President, instead of obeying what a group of politicians might decide in a hotel in Chicago in the early hours of the morning.

Senator AUSTIN. Have you made special study of the provision that the Congress shall have power to prescribe uniform laws which shall be submitted to the electorate of the various States?

Mr. SULLIVAN. I have not given it any special study. I am familiar with it.

Senator AUSTIN. Mr. Chairman, before the hearings are closed, I would like to have incorporated in the record two letters from Mr. George L. Hunt, a lawyer of Montpelier, Vt., written to me in connection with the resolution before the committee.

Senator NORRIS. They may be incorporated in the record. (The documents referred to, respectively, are here set forth in full, as follows:)

JANUARY 13, 1938.

Hon. WARREN R. AUSTIN,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: In a news item in the Burlington Free Press of the 12th instant, under an Associated Press, Washington date line, it is said, concerning the Norris project to submit proposals of amendments of the Constitution to direct popular vote that "Senator Austin (Republican, Vermont), a member of the Norris subcommittee, a bitter foe of the court bill, has told Norris he is for the amendment." I would be glad to believe that this report is incorrect.

A fundamental ailment in the body politic is the accelerating movement from a representative democracy, which the founders built, to a pure democracy, a system that never worked even in the comparatively small communities of Ancient Greece, and which is utterly impracticable in this country. The more we scrap the instrumentalities of the representative government and attempt to apply power by direct popular vote, the rougher the going. We started to tear down our representative form of government with the seventeenth amendment, and the process has been going on ever since. This is the fundamental defect with the Ludlow proposal, just defeated, a defect which, I was surprised to note, the President clearly stated, notwithstanding his stress of "majority rule" and apparent disregard of minorities.

Majority principle, to my mind, if by that is meant a popular majority, was never intended to have direct rule under our form of representative government, except in the affairs of small local units, as in town meeting. The various devices that are advanced for popular vote on subjects of state policy, which are committed by the Constitution to the wisdom and virtue of chosen representatives of the people, are, I believe, increasingly a menace to our welfare as a nation.

Doubtless I am too "horse-and-buggy" in my ideas, but surely the Norris proposal strikes at the very taproot of our representative democracy and converts us at one stroke into as nearly a pure democracy as could be imagined.

I am not ready to discard State legislatures and State conventions, which are or should be deliberative bodies, as the peoples representatives in such an important matter as the amendment of the Constitution, and to submit the question to a country-wide popular vote, with all that that implies, and I believe that most Vermonters, understanding what this project imports, would not approve it.

Yours very truly,

GEORGE L. HUNT.

JANUARY 18, 1938.

Hon. WARREN R. AUSTIN,
Senate Office Building, Washington, D. C.

DEAR WARREN: I thank you for your letter of the 15th instant in reply to mine of the 13th instant regarding the Norris joint resolution.

Surely I concur in your points (1) and (2). As to the latter, so far as Vermont is concerned, the reference to "general elections," would seem to make it clear that the period is 2 years. The question of the frequency of State action, however, is involved in the broader question, which I believe is still mooted in some quarters, of how often a State can act on a proposal, that is, whether its action, once had, is not determinative.

I believe, as you state in your point (3), that the clause empowering Congress to prescribe the form of state action should be stricken.

The fundamental point, upon which we obviously differ, remains, namely, that a direct popular vote on a proposal to amend the Constitution is a dangerous threat to our form of a representative democracy. As you say, a satisfactory discussion of the subject is beyond the proper scope of a letter. Noting your reference to the proceedings had here for ratification of the repeal of the eighteenth amendment, you may recall that at that time, which was about 5 years ago, I seriously opposed the bill as introduced providing for the set-up and action of the State convention. My objections received a measure of publicity, as a result of which the bill as originally presented was modified in important respects, although not to the extent that I had felt should be done. In a communication I made at that time, I undertook to meet the claim that the plan then proposed found a precedent in the method of amending our own Constitution, a claim you now renew in support of the present project as being "essentially a Vermont principle," by endeavoring to bear out a material distinction in the following language: "While our own constitutional amendments are submitted to a direct vote of the freemen, that procedure lends no support to ratification here by popular vote. It is merely an additional safeguard, for such amendments first require the concurrence of two successive legislatures with State-wide publication thereof between the sessions."

The right of the people to vote on the proposal to amend the Vermont constitution gives the people merely the power to vote on such proposals of amendments as shall have already been concurred in by the House of Representatives at one session, published in the principal newspapers of the State, and concurred in by both houses of the general assembly at the next following general assembly. Here is but a check preventing the representatives from amending the constitution contrary to the will of the people; it does not permit the people directly to amend the constitution contrary to the will of the representatives, or independent of their will, as does the pending proposal relating to the National Constitution. I do not regard our Vermont rule as in any degree a departure from the theory of representative democracy, but merely an additional safeguard

Of course, you may use my letter of the 13th and any other communication, if you desire, although they are not written with that at all in view.

Cordially yours,

GEORGE L. HUNT.

Senator NORRIS. The hearings are closed.

(Whereupon, at 3:15 p. m., the hearings were closed.)

[Statement on Senate Joint Resolution 134 in lieu of facts to have been presented at hearing:]

NATIONAL REPUBLIC,
Washington, D. C., February 10, 1938.

Hon. WARREN R. AUSTIN,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: It was agreed by your committee, on the morning of February 8, that those not being permitted, because of lack of time, to testify in person on Senate Joint Resolution 134 could file a statement which would be placed in the records of the hearing on the resolution. I wish, therefore, to submit the attached statement for the hearing record.

When the hearing record is published, I hope that we will receive a copy of it through your office.

Respectfully yours,

NATIONAL REPUBLIC,
WALTER S. STEELE.

SUBCOMMITTEE OF THE JUDICIARY,
United States Senate:

To repeal article V, section I of the Constitution of the United States and to substitute therefor the Norris amendment is, to our minds, objectionable on the same grounds as those presented by President Franklin D. Roosevelt on January 10, 1938, in his objection to the Ludlow war referendum.

The President of the United States asserted at that time in a special appeal to Congress for rejection, that—

"Our Government is conducted by the people through representatives of their own choosing. It is with singular unanimity that the founders of the Republic agreed upon such free and representative form of government as the only practical means of the government by the people."

1. Senate Joint Resolution 134 (Norris amendment) in its original form will force the States to refer the question of constitutional amendments to a direct vote of the people at the (next) general election following adoption of Senate Joint Resolution 134. This therefore destroys the representativee form of government as warned against by President Roosevelt in his special letter to Congress of January 10, 1938 with regard to the Ludlow amendment. Under article V, section I, to be repealed by Senate Joint Resolution 134, the people deal with constitutional amendments through State "representations of their own choosing," or, if preferred, through State conventions.

2. The proposed amendment would also rob the States of a right now enjoyed under the Constitution, article V, section I, to initiate a constitutional amendment if two-thirds of the States feel the need of amendment. Therefore, Senate Joint Resolution 134, would rob the people of their right, through "representatives of their own choosing", to initiate amendments (whether added rights or repeal of present) to the Constitution. Senate Joint Resolution 134 would centralize all power of constitutional initiative in the Federal Congress.

3. Senate Joint Resolution 134, evidently intended to speed up action on constitutional amendments in the States, would in reality cause delay in comparison to the present procedure. Historical facts prove that the average period taken in ratification of 21 of the 26 amendments to the Federal Constitution, voted on by States, has been one and one-third years, whereas, Senate Joint Resolution 134, compelling a vote of the people on such amendments at the "next general election" after adoption of Senate Joint Resolution 134 could delay action from 2 to 4 years, since in some States general elections are held only every 2 years, and in others every 4 years. Legislatures meet each and every year.

4. If it is the intention of Senate Joint Resolution 134 to reach a more direct expression of a greater number of people by forcing them to referendum, the history of direct vote by the people on State questions disproves that the method as set forth in Senate Joint Resolution 134 will accomplish such. A glance at many of the election ballots will show why. Some of the ballots have already reached the enormous size of from 3 to 6 feet in length. In California a 212-page publication was issued, in which was set forth the many complicated issues the voters were asked to deal with at general elections in 1936. The result is, as for instance in Louisiana where the ballot has reached the size of about 3 by 4 feet, printed in small type, that the greatest number of people ever voting on State constitutional amendments are 25 percent of those voting at the time for political candidates. The majority of that 25 percent has carried amendments. Here is the danger, insofar as Federal questions are concerned, of an organized minority control, which our Constitution attempts to prevent.

5. Some have objected to the present requirement of three-fourths of the States to ratify an amendment to our Constitution. Others have suggested it should be one more than 24, or only a majority. Senate Joint Resolution 134 would reduce the required number of States to two thirds. Evidently the Constitutional Convention, which framed article V, section I, now to be repealed by Senate Joint Resolution 134, realized that New York State, for instance, would have a population 100 times that of Nevada, and inaugurated, therefore, the requirement of three-fourths of the States, rather than a smaller ratio, to offset the unequal distribution of population, thereby preventing, insofar as possible, sectional rule.

6. Throwing such an important question as an amendment to the Constitution of the United States of America into the confusion of a general election, as proposed by Senate Joint Resolution 134, is another bad precedent to set, in that it is agreed that such an important step as the remaking of our Government demands more sober thought, the barring of distraction of the people from the major issue the remaking or tinkering with the major instrument of National Government—the Constitution. Too many additional issues are already occupying the minds of the people at the polls. Many do not now vote on State issues for fear they will not vote intelligently. They do not understand some of the amendments placed before them on the ballot.

7. There is danger from another angle in trying to shoulder all responsibilities of the most important questions of our Government directly onto the backs of the people. That is the effect such action might have on Congress itself. To save its own face from meeting issues squarely, would not Congress eventually get to the point where it would itself loosely ratify amendments with the idea of letting the people settle the question, thereby subjecting the public to numerous amendments? There are now 129 or more amendment proposals before Congress. Wouldn't the setting of a precedent of direct vote on constitutional issues finally

lead to demands in Congress for voting on other issues, as has been the trend in the case of States where, first, the direct vote was required on State constitutional amendments, and, now, on scores of issues? Wouldn't this finally resolve itself into a cry for the need of only one body in Congress, and thereby the setting up of a system of one legislative body, which now exists in Mr. Norris' own State, Nebraska, and which would take away from the people one more check and balance?

Gentlemen of the Judiciary Committee of the United States Senate, it would appear that the present article V, section I, is the best and safest method of amendment yet devised, and we should not be too hasty in altering it, lest we find that such a change disrupts the smooth running of the Constitution as a whole. Remember, article V is a separate and distinct provision in the Constitution, but it is still a cog in the gear which turns the wheels of our entire Government. Would not the proposed change by Senator Norris conflict therefore with article IV, section 4, which guarantees to every State in the Union a republican form of government, a system as described by Mr. Roosevelt on January 10, 1938, in which the people deal through representatives of their own choosing, and with article X (amendment) reserving to the States respectively all powers not delegated to the United States by the Constitution?

In my opinion Senate Joint Resolution 134 should be defeated.

Respectfully,

WALTER S. STEELE,
Managing Editor, National Republic, and Chairman, National Security Committee, American Coalition of Patriotic Societies.

(Embracing 116 national organizations, with a membership of over 4,000,000.)